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## **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1945**

**No. 107**

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**INTERNATIONAL SHOE COMPANY, APPELLANT,**

**vs.**

**STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER**

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**APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON**

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**FILED JUNE 4, 1945.**





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[fol. 1]

**IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY**

No. 34 2190

INTERNATIONAL SHOE COMPANY, a Corporation, Plaintiff,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPEN-  
SATION AND PLACEMENT, and E. B. RILEY, Commissioner,  
Defendant

**CERTIFICATE OF COMMISSIONER**

I, E. B. Riley, the undersigned Commissioner of Unem-  
ployment Compensation and Placement of the State of  
Washington, hereby certify that attached hereto is a full,  
true and correct record of all proceedings had in the above  
matter.

Dated at Olympia, Washington, this 7th day of April,  
1943.

E. B. Riley, Commissioner of Unemployment Com-  
pensation and Placement. (Seal.)

[fol. 2] **STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT, OLYMPIA**

In the Matter of the Assessment of Contributions or Interest  
Against INTERNATIONAL SHOE COMPANY, a Corporation,  
An Employer.

**ORDER AND NOTICE OF ASSESSMENT**

The Commissioner of Unemployment Compensation and  
Placement of the State of Washington:

To International Shoe Company, a Corporation:

It appears to the Commissioner that you have failed or  
refused to pay contributions or interest due the Unemploy-  
ment Compensation Fund for the period Jan. 1, 1937 through  
Dec. 31, 1940 and that said contributions or interest are now  
delinquent.

It Is Therefore Ordered By the Commissioner, pursuant to the power conferred upon him by Chapter 162, Laws of 1937, as amended, that the contributions or interest due and owing by you for said period are hereby determined to be the sum of Six Thousand and 00/100 Dollars (\$6000.00), and said contributions or interest are hereby assessed against you.

Notice Is Hereby Given That unless payment of said contributions or interest, together with interest on unpaid contributions at the rate of 1% per month or 1/30 of 1% for each day or fraction thereof from the due date, is received within ten days after the date of service or mailing of this notice, the assessment indicated herein will become final and an action to distrain and sell sufficient of your goods, properties and chattels to satisfy this assessment may be commenced without further notice.

Section 14(e), Chapter 162, Laws of 1937, as amended by Chapter 258, Laws of 1941:

"When any notice of assessment has been delivered or mailed to a delinquent employer, as heretofore provided, such employer may within ten days thereafter file a petition in writing with the commissioner, stating that such assessment is unjust or incorrect and requesting a hearing thereon. Such petition shall set forth the reasons why the assessment is objected to and the amount of contributions, if any, which said employer admits to be due the Division of Unemployment Compensation. If no such petition be filed with the Commissioner within said ten days, said assessment shall be conclusively deemed to be just and correct. The filing of a petition on a disputed assessment with the commissioner shall stay the distraint and sale proceeding provided for in this section until a final decision thereon shall have been made, but the filing of such a petition shall not affect the right of the commissioner to perfect a lien, as provided in section 14(b), upon the property of the employer. The issues raised by such petition shall be heard by the appeal tribunal, established in section 6 of this act, in the same manner and in accordance with the same procedure as is prescribed for appeals from benefit determinations, including the procedure set out in section 6 for review by the commissioner and the court."

Done under my hand this 7th day of October, 1941, at Olympia, Washington.

Commissioner of Unemployment Compensation and Placement by J. D. Davis (Authorized Representative). (Seal.)

Duplicate—Central Office Copy.

[fol. 3] . RETURN OF SERVICE

STATE OF WASHINGTON,  
County of King, ss:

I, L. W. Thomason, being first duly sworn, on oath depose and say: That I am and was at all times and dates herein mentioned, a citizen of the United States and of the State of Washington, over the age of twenty-one years, not a party to the within Notice of Assessment and competent to be a witness in any action that may be brought thereon; that I personally served the within notice on International Shoe Company, a corporation on the 14th day of October, 1941, in King County, Washington, by delivering to and leaving with

(1) Said ——— personally;

(2) ——— at the house of the usual abode of said ——— in said ——— County, Washington, said ———

being a person of suitable age and discretion then resident therein;

(3) Each of said persons, personally;

(4) Edward S. Alley personally, he then and there being the salesman and agent in charge of the Seattle Office of said corporation, at 613 Terminal Sales Building

a full, true and correct copy of said notice:

Dated this 10th day of October, 1941.

L. W. Thomason.

Subscribed and Sworn to Before Me this 14th day of October, 1941. Justina Gardner, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)



[fol. 4] STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT

SPECIAL APPEARANCE, MOTION TO QUASH SERVICE AND OB-  
JECTION TO THE JURISDICTION

International Shoe Company, 1509 Washington Avenue,  
St. Louis, Missouri.

To the Commissioner of Unemployment Compensation and  
Placement:

A copy of Notice by the Commissioner of Unemployment Compensation and Placement, was left with one, E. S. Alley, a salesman of the undersigned, International Shoe Company, at Seattle, Washington on October 10, 1941, demanding payment of delinquent contributions or interest in the sum of Six Thousand (\$6,000) Dollars.

The International Shoe Company appears specially and moves to quash the service of the above mentioned Notice of Assessment upon the ground that the same was not served upon the corporation by delivering a copy thereof to the president, or other head of the corporation, secretary, cashier, managing agent, or any other agent, as required by law.

Upon the further ground that the International Shoe Company is a corporation, organized and existing under and by virtue of the Laws of the State of Delaware and is not engaged in business within the State of Washington; is doing only interstate business; has no agent or other person within the State of Washington upon whom service of process may be made; is not subject to suit or action within the State of Washington, nor subject to service of any special process.

[fol. 5] And further objection to the jurisdiction of the Commissioner to make such assessment and to give notice thereof, is made upon the ground that the International Shoe Company is not an Employer and does not furnish Employment within the State of Washington, within the meaning and scope of Chapter 162, Laws of 1937 as amended, and is therefore not subject to, and liable for, contribution under the Unemployment Compensation Act.

International Shoe Company requests a Hearing upon the above.

Dated at St. Louis, Missouri, this 48th day of October, 1941.

International Shoe Company, by Stern, Orton & Stern. By Allen Orton, Its Attorneys, 1605 Exchange Building, Seattle, Washington.

[fol.6] STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT

NOTICE TO APPEAR BEFORE THE APPEAL TRIBUNAL

Date December 1, 1941.

In the Matter of a Petition for Hearing by INTERNATIONAL  
SHOE COMPANY

To Stern, Orton & Stern, Attorneys at Law. Interested as  
Attorneys for Petitioner, Exchange Building, Seattle,  
Washington.

Notice is hereby given that the above-entitled matter will  
come on regularly for hearing on Tuesday (Day), Decem-  
ber 9, 1941 (Date), at 10 A. M. (Time) at Assembly Room  
(Place), 401 Smith Tower, in the City of Seattle, Wash-  
ington.

You or your duly authorized representative should enter  
an appearance, at the time and place indicated, for the pur-  
pose of offering testimony and submitting in evidence all  
records, documents and other written matter pertaining to  
the issues raised by the said appeal. If you require addi-  
tional information, please contact, at once, this office, or any  
office of the United States Employment Service.

Yours very truly, W. G. Preston, Executive Appeal  
Examiner.

WGP:JW.

[fols. 7-9] STATE OF WASHINGTON OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT

NOTICE TO APPEAR BEFORE THE APPEAL TRIBUNAL

Date December 1, 1941.

In the Matter of a Petition for Hearing by INTERNATIONAL  
SHOE COMPANY

To International Shoe Company. Interested as Petitioner,  
1509 Washington Avenue, St. Louis, Missouri.

Notice is hereby given that the above-entitled matter will  
come on regularly for hearing on Tuesday (Day), December  
9, 1941 (Date), at 10 A. M. (Time) at Assembly Room  
(Place), 401 Smith Tower, in the City of Seattle, Washing-  
ton.

You or your duly authorized representative should enter  
an appearance, at the time and place indicated, for the pur-  
pose of offering testimony and submitting in evidence all  
records, documents and other written matter pertaining to  
the issues raised by the said appeal. If you require addi-  
tional information, please contact, at once, this office, or any  
office of the United States Employment Service.

Yours very truly, W. G. Preston, Executive Appeal  
Examiner.

WGP:JW.

[fol. 10] BEFORE THE APPEAL TRIBUNAL

OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT,  
STATE OF WASHINGTON

P-46

In the Matter of a Petition for Hearing by INTERNATIONAL  
SHOE CO.

This matter came on regularly for hearing at Seattle,  
Washington, on the 9th day of December, 1941, pursuant  
to notice duly given, before J. R. Walsh, Appeals Examiner.  
Samuel Klegman, Appeals Reporter.

7  
The parties were represented as follows:

International Shoe Company by Allen Orton (Stern, Orton & Stern), Attorney, 1605 Exchange Bldg., Seattle, Wash.; Unemployment Compensation Division by Wm. J. Millard, Jr., Asst. Attorney General and further by John F. Lindberg, Jr., Attorney, Old Capital Bldg., Olympia.

Witnesses were sworn and examined, and the following proceedings were had to-wit:

[fol. 11] Examiner Walsh: We will come to order, please. This hearing was scheduled as the result of a Petition for Hearing filed by the International Shoe Company. The record shows that an assessment was levied and served upon Edward S. Alley, a salesman and agent in charge of the Seattle office at 613 Terminal Sales Building, and a notice of assessment was served by registered mail on the company in St. Louis, requesting the payment of contributions to the Unemployment Compensation fund from January 1, 1937 to and including December 31, 1940.

From this notice of assessment the Petitioner duly filed a Petition for Hearing which is now properly before us for hearing. You may proceed.

Mr. Lindberg: Mr. Orton, I believe you talked to Mr. Millard about making a couple of changes in this stipulation as it now stands.

Mr. Orton: The stipulation as it now stands contains these two changes. Other than that they are exactly alike.

Mr. Lindberg: We can agree to the first change in the stipulation but we can't agree to the second change until you prove it, as that is contrary to the evidence in the prior hearing had in Spokane.

Mr. Orton: Has there been a hearing on the International Shoe Company in Spokane?

Mr. Lindberg: In Spokane, yes.

Examiner Walsh: There was a claim filed by a former employee, as I understand, and they heard his request for benefits.

Mr. Orton: May I suggest then that the stipulation be filed as it stands with leave to the International Shoe Company to offer proof of same.

[fol. 12] Mr. Lindberg: We are prepared to continue this until you find proof, until this afternoon or the next week.

Mr. Orton: I have no doubt that the proof can readily be

produced. We could have had it here this morning. I don't know what the significance of it is, but my clients insist that it be in there. I will be willing to submit the stipulation with that portion stricken, with leave to submit proof and I could submit the proof this afternoon if Mr. Alley is in the city, but he may not be here. I talked with him and did not think it necessary that he be here because we had all the facts stipulated. I could produce it this afternoon, otherwise I will ask for an extension for a few weeks.

Mr. Lindberg: Next week?

Mr. Orton: Next week.

Mr. Lindberg: That will be satisfactory.

Examiner Walsh: And the facts have all been stipulated.

Mr. Orton: All been stipulated with that exception and the exception is that portion of the stipulation—maybe I had better refer to it so that the record is clear. It is that portion of the stipulation which appears on—

Mr. Lindberg: Page 2.

Mr. Orton: (Continuing)—page 2, paragraph 3, commencing on the fifth line of said paragraph, and reading as follows:

... and are required as part of their duties to spend certain time each year in St. Louis, Missouri for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling, and to receive information with reference to [fol. 13] construction and new types and kinds of shoes which are to be offered to the trade.

Mr. Lindberg: It will be satisfactory then to continue this.

Mr. Orton: May I ask whether it is proper procedure to submit a written brief on this and if so, what length of time will be allowed?

Examiner Walsh: May we have a brief from both sides? How long would you like to have?

Mr. Orton: Well, I could prepare my brief in a week's time, but we are conducting this proceeding in cooperation with Mr. O. Rumer, who is chief attorney for the International Shoe Company at St. Louis and if there is a brief we should submit it to him for his approval and that being the



case I should like additional time, I should say at least three weeks.

Examiner Walsh: That would be about the first of the year, then or would you have it in by December 31?

Mr. Orton: Well, I would like to have, if possible, it run into the first week of the next year. If we can have it on Tuesday, January 6, I would appreciate the extension of time.

Examiner Walsh: Does the State wish to put in a reply brief?

Mr. Lindberg: We could put in a reply brief by January 6.

Examiner Walsh: This copy is to be placed in the record?

Mr. Orton: Yes, I think it should be signed by the attorney general.

Examiner Walsh: The agreed stipulation of fact will be introduced as Exhibit No. 1, with the exception of that one [fol. 14] paragraph as read and that will be allowed to remain provided evidence is put in to support that?

Mr. Orton: That is correct, and as I understand it, we will offer to prove that and it is up to the Examiner to determine whether it is the truth or not. Is that not correct that we will offer to prove and he is to make the findings of proof, otherwise the facts are all stipulated?

Mr. Lindberg: Yes, that is right.

(Stipulation of Facts, marked Exhibit No. 1 for identification and admitted in evidence.)

Mr. Orton: And if you desire me to do so, I can go now and see if I can get Mr. Alley and see if we can finish it up today or not.

I will make the statement that my name is Allen Orton, with the law firm of Stern, Orton & Stern, attorneys for the International Shoe Company and I appear here specially pursuant to the Special Appearance, Motion to Quash and Objection to Jurisdiction and the appearance shall in no way be construed to be a general appearance to waive any jurisdictional claims that we make on behalf of our clients.

Examiner Walsh: We will continue this hearing at one o'clock.

{fol. 15]

Seattle, Washington,  
December 9, 1941,  
1:00, P. M.

Mr. Orton: I will call Mr. Alley.

EDWARD S. ALLEY called as a witness in behalf of the Petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Orton:

Q. Will you state your full name, please?

A. Edward S. Alley.

Q. And you are an employee of the International Shoe Company?

A. The Friedmann-Shelby branch of the International Shoe Company; yes, sir.

Q. And how long have you been so employed?

A. I have been with the International Shoe Company since January 1, 1924 and with the Friedmann-Shelby branch of the International Shoe Company since June of 1936.

Q. How long have you been in the State of Washington?

A. Have been in the State of Washington since June of 1936.

Q. And you are a salesman employed by them?

A. That is right, that is right.

Q. I see.

Mr. Orton: I might state, Mr. Millard, that there is no necessity of going into his duties. He is here only for the purpose of proving one fact.

[fol. 16] By Mr. Orton:

Q. Do you go to St. Louis at all?

A. Yes, sir, have been required to go to St. Louis either once or twice a year with the exception of this year. I was supposed to leave this coming Thursday night for St. Louis for our regular instruction meeting but due to this emergency, the sales manager was out here today and cancelled this meeting. With this one exception, we are required to go either once or twice a year depending on the conditions of our work.

Q. And the same is true with the other employees?

A. Yes, with all of them. If our territories are not doing too well, we have to go twice. They figured we need more instruction and if we are doing well, they let us go sometimes, and we go only once a year.

Q. That is true whether it is the branch that you are connected with or any other branch?

A. The meetings are at the same time. When those of the Friedmann-Shelby go to St. Louis for their instructions, the other branches come at the same time and they have their meetings in different hotels. We will usually use the DeSoto or the Jefferson, Peters at the Coronado and the Robert Johnson Rand down at the Statler:

Q. They work, the meetings at the same time?

A. Yes, that is true.

Q. Just what do they tell you, just what is the nature of the meetings?

A. We have a general meeting first. We will open with a general meeting for all the different divisions, the northern division and western division, southern division, depending on the branch. Then after a general meeting they have a general meeting just for that branch. That is, the general manager makes talks generally about general conditions and what we have done and what they have hoped to do, and usually some one of the International men will come in and talk [fol. 17] to us, for instance, the hide buyer tells what the hide situation looks like and then we may have some of the other executives. Then after the first general meeting, we have a lot of what we call group meetings. They divide us up into various groups, small units and each group has a captain, and they rotate us. For instance, I am in group No. 5, why I will be in a merchandising meeting where there will be a style man, and he will be telling us about the style trends for the coming season, what colors for instance are going to sell, what kind of patterns, and while he is talking to my group, some other man is talking on women shoes in another group.

Then from that meeting that I have attended, possibly on women shoes, I will go to a meeting on men's shoes, and they will tell us about men's shoes, new lasts that have been added and changes that have been made in construction, widths that have been added to some particular patterns selling big and from there we go to one on children's shoes, juvenile shoes. From there on work shoes and that probably would take about two days and the next day we have

a general meeting in charge of the advertising manager. He tells us about the national campaign that they are going to run for that season, or some new promotional plan or direct mill tie-up that we are making, and probably assign us advertising quotas while there and then we would go from that meeting perhaps to a manufacturer's meeting, where Mr. Quinn probably would tell us about a new factory we have, two new factories in there, telling us about these two new factories, the new equipment that we have, and the improvement that it would make in shoes, and why they felt it necessary to bring in these new units.

[fol. 18] And then in the usual order we have what we call a house slipper meeting under the direction of Mr. Norton and he would tell us about our house slipper line and this year we are bringing in a lot of play shoes, play types, something new with us, with rubber soles, and he would explain the set-up and the prices and terms and after that, we would have one day, where we have to see every department manager in our branch. They give us a card, now, on this card it has the general manager's name, and it has the sales manager's name, and the credit manager's name, merchandise manager's name, the advertising manager's name and then on the bottom is the cashier's name. We have to see each one of these men personally, starting with the general manager, which is just general information, the conditions in our territory, how we are getting along, how the family is and that sort of thing, then we go to our sales manager and if we are not doing too well, then there is a real honest too goodness session. If you are doing well, he will pass us off with a little congratulation, if not, why then he goes over the territory town by town. He asks, what the matter is with Puyallup, Port Angeles, or will say, "What is the matter, you are not getting the volume out of Seattle," all that sort of thing. We take it up with him, any particular problems, anything that is wrong and that needs correcting. Finally, he signs your card, the general manager, and we go to the credit manager and then we really have something.

We go over each account, the accounts that you figure that he is not giving enough credit, that you could double your volume if they gave you \$500 more credit on him and you fight that out, and other accounts, they say they should not ship at all, and you put up a fight to keep him on the [fol. 19] credit-list and when you are through with him, he

signs your card and then you go on down the line with each one, merchandise manager, he usually gives you a lot of awfully good information about what to sell and how much to sell, he takes your individual section into consideration and covering more than he would in a general meeting for everybody. After all, what they sell in Florida doesn't interest me in Seattle, and they leave that out. Then the correspondence department, you have to go there. He brings out maybe that you have not answered your mail. He pulls out your folder, and he has a stack of files that need to be cleaned up, and go over them personally and takes it piece by piece and makes a definite decision on each one, clearing that all up. And finally after you are all through you can take your card to the cashier and he signs it and he gives us our expense money. That is the way you get your expense money, when you prove you are through.

Q. That is the pleasantest call.

A. That that is probably along in the afternoon, and then that night we have a general banquet where we have an inspirational social time, big boys all, wishing us well and we have a big dinner and then the next morning we have until noon to clean up everything that we have not gotten to, they give us that night, and the next morning we have to think over anything what we have overlooked, clear that up and then we are to be out of there that night sometime, any time after that why we are free to go when we can. They want everybody out of town that night, and those conventions are held twice a year. We were due for this year for the 15th of December for our spring convention and the one for the fall line I believe was to have been in May, depending on conditions and this last year in May and as I say, I received instructions to leave for St. Louis [fol. 20] this coming Thursday night, to be in St. Louis by Sunday to attend this convention and when all this emergency came up, the boss, Mr. Williams, came out here, and he has wired me to stay here, that Mr. Williams was coming here, and he told me this morning, in view of this emergency and uncertain conditions, they had cancelled the convention and that is the only exception since I have been out here.

Mr. Orton: I have no further questions. Did you desire to ask any questions?



## Cross-examination.

By Mr. Millard:

Q. You have been in the employ of the company since 1936 and the years we are interested in are years '37, '38, '39 and '40?

A. Yes, sir.

Q. During '37, '38, '39 and '40, did you go back to St. Louis at least once each year?

A. Yes, sir, I did.

Q. Did all other salesmen employed in the state such as yourself go back?

A: Yes, sir, there have been no cancelled conventions during those years.

Mr. Millard: I have no further questions.

Mr. Orton: That is all.

(Witness excused.)

Examiner Walsh: The statement of facts as entered here will be agreed as complete and all the paragraphs are agreed upon?

Mr. Orton: Is that satisfactory to you, Mr. Millard?

Mr. Millard: Yes.

[fol. 21] Mr. Orton: Then this shall be taken as the sole evidence in this case.

Mr. Millard: That is satisfactory. It is so stipulated that the stipulation entered into between the State of Washington and the International Shoe Company through their respective counsel plus the testimony of Mr. Alley shall constitute the full facts in this matter.

Examiner Walsh: The record will be closed.

[fol. 22]

## EXHIBIT No. 1

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPEN-  
SATION AND PLACEMENT

No. P-46

In the Matter of the Special Appearance, Motion to Quash  
and Objection to Jurisdiction of International Shoe  
Company.

## STIPULATION OF FACTS

It Is Hereby Stipulated, by and between the Commis-  
sioner of Unemployment, Compensation and Placement of  
the State of Washington, through the Attorney General of  
the State of Washington, and the International Shoe Com-  
pany, through Stern, Orton & Stern, its attorneys, as fol-  
lows:

## I

This stipulation of facts is made for the purpose of pre-  
senting to the appeal examiner and such other tribunals  
as this matter may come before on appeal, or otherwise,  
questions raised in this proceeding by the special appear-  
ance, motion to quash service and objection to the juris-  
diction filed in this proceeding by the International Shoe  
Company and it is specifically understood and agreed that  
the stipulation of facts shall not constitute a general ap-  
pearance by the International Shoe Company, but that it,  
at all times retains such rights as it may have under the  
special appearance referred to.

## II

International Shoe Company is a Delaware Corporation.  
It has its principal place of business in the City of St.  
Louis, Missouri. Its principal business consists of manu-  
facture and sale of boots, shoes and other footwear. It  
maintains places of business where manufacturing is car-  
ried on and from which its merchandise is sold in the states  
of Missouri, Arkansas, Illinois, Kentucky, North Carolina,  
Pennsylvania, New York and New Hampshire. Its mer-  
chandise is sold through its several selling divisions or  
branches, the following branches being the only ones doing

[fol. 23] any sort of business with residents of the State of Washington.

Roberts, Johnson & Rand  
Peters  
Friedmann-Shelby  
Specialty

It has not a place of business in the State of Washington; maintains no general agent in the State of Washington. It makes no contracts, either of sale or of purchase in the State of Washington. It maintains no stock of merchandise in the State of Washington and makes no deliveries of merchandise in intrastate commerce in the State of Washington. Attached hereto, marked Exhibit "A," referred to and by reference incorporated herein as though fully set forth, is a statement of all travelling salesmen, residing in, and whose principal activities have been within the State of Washington for the year 1937, 1938, 1939 and 1940. Said statement gives the names of each employee, the amount earned by the said employees, a compilation of the potential tax due the State of Washington, if any tax be due, the Social Security numbers of the employees and the amount paid to the Federal Government under Title # 9, of the Federal Social Security Act.

### III

The manner in which the business of International Shoe Company is carried on in the State of Washington, is generally as follows:

Salesmen are employed from the head office at St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are required as part of their duties to spend certain time each year in St. Louis, Missouri for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling, and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the salesmen rent

sample rooms in business buildings and the expenses of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities to which they travel.

#### IV

Such transactions as the International Shoe Company has with persons in business, or who reside in the State of Washington, involving the sale and distribution of its merchandise to merchants in the State of Washington and are conducted as follows.

Each salesman is given a designated territory in which to solicit orders. The authority of the salesman is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If orders are obtained, to transmit them to the office of the International Shoe Company outside the State of Washington for acceptance or rejection, and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F. O. B., shipping point, from outside of the State of Washington. Practically all merchandise shipped by International Shoe Company into the State of Washington is on orders approved in St. Louis, Missouri and shipped therefrom. The merchandise which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which point collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salesman's duties and authority being limited strictly to the solicitation of orders.

The salesmen are under the direct control and direction of the International Shoe Company and are not permitted [fol. 25] to be engaged in an independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company.

On October 10, 1941, a copy of Notice of Assessment by the Commissioner of Unemployment Compensation and Placement, was delivered to and left with one, E. S. Alley, a salesman of the International Shoe Company, at Seattle, Washington, demanding payment of delinquent contributions or interest, in the sum of \$6000. Said sum was not arrived at by calculation of the wages earned by salesmen of the International Shoe Company within the State of Washington, but was an arbitrary figure set by the Commissioner. E. S. Alley is a salesman of the International Shoe Company, employed upon the terms and under the authority and for the purpose, as hereinabove referred to for employees of International Shoe Company within the State of Washington. A copy of the same notice of assessment was also placed in the United States mails, postage fully prepaid, addressed to International Shoe Company at St. Louis, Missouri, on the 10 day of October, 1941. Thereafter, and on the 18th day of October, 1941, International Shoe Company filed with the Department of Unemployment Compensation and Placement, its special appearance, motion to quash service and objection to jurisdiction.

Unemployment Compensation and Placement Division, by John F. Lindberg. International Shoe Company, by Allen Orton of Stern, Orton & Stern, Its Attorneys.



Missouri)  
Sales Unit  
Represented  
R. J. & R.

Name of Salesman

Earnings for Year

Up to \$3,000	Excess of \$3,000	Total
3,000 00	731 76	3,731 76
2,307 44		2,307 44
3,000 00	620 93	3,620 93
3,000 00	270 89	3,270 89
350 00		350 00
2,783 68		2,783 68
3,000 00	225 95	3,225 95
2,801 36		2,801 36
2,486 93		2,486 93
779 24		779 24
3,000 00	1,258 71	4,258 71
3,000 00	3,481 30	6,481 30
\$29,508 65	\$6,589 54	\$36,098 19
		1.8%
		\$649 77

Total Washington State Rate  
Potential State Tax  
(2% Federal Tax \$721.96 paid to Federal Government)

"D"

R. J. & R.  
493-01-1830  
492-01-5587  
493-01-1836  
492-01-5984  
494-01-3867  
492-01-5992  
497-01-6281  
489-01-2268  
494-05-8081  
492-01-9076  
492-01-9075  
Specialty

Carl A. Ebeling  
Carl W. Hall  
John H. Hall  
Bernard J. Kelley  
Earl Elton McDonough  
Burton Mitchell McKay  
Joshua Thomas Rackam  
Edward Shaw Alley  
Oscar Karl Anderson  
Harry Bernard Swanson  
Allen K. Umphrey

3,000 00	90 59	3,090 59
2,036 43		2,036 43
3,000 00	307 45	3,307 45
3,000 00	592 81	3,592 81
2,636 13		2,636 13
3,000 00	103 14	3,103 14
2,466 23		2,466 23
2,501 13		2,501 13
1,223 19		1,223 19
3,000 00	966 02	3,966 02
3,000 00	1,152 51	4,152 51
\$28,862 11	\$3,212 52	\$32,075 63
		2.7%
		\$806 04

Total Washington State Rate  
Potential State Tax  
(3% Federal Tax \$962.27 paid to Federal Government)

Traveling Salesmen  
State of Washington  
Commissions Paid 1937

Missouri Sales Unit Represented	Salesman's S. S. Number	Name of Salesman	Earnings for Year		
			Up to \$3,000	Excess of \$3,000	Total
"E" R. J. & R.	493-01-1830	Carl A. Ehling	3,000.00		3,103.52
	492-01-5587	Carl W. Hall	2,169.24	103.52	2,169.24
	493-01-1836	John H. Jall	3,000.00		3,607.17
	492-01-5984	Bernard J. Kelley	3,000.00	607.17	3,607.17
	494-81-3867	Earl E. McDonough	3,000.00	900.64	3,900.64
Peters	492-01-5892	Burt M. McKay	2,825.45		2,825.45
	497-01-6281	Joshua T. Rackam	765.40		765.40
	493-01-1860	Raymond C. Thatcher	2,697.92		2,697.92
F. Shelby	489-01-2268	Edward S. Alley	1,381.17		1,381.17
	494-05-8081	Oscar K. Anderson	2,511.23		2,511.23
	547-07-1871	Frederick W. Richards	615.48		615.43
Specialty	492-01-9076	Harry B. Swanson	1,061.99		1,061.99
	492-01-9075	Allen K. Umphrey	3,000.00	1,081.93	4,081.93
			3,000.00	2,035.33	5,035.33
Total			\$29,027.83	\$4,818.91	\$33,846.44
Washington State Rate				2.7%	\$913.85

Potential State Tax  
(3% Federal Tax \$1,015.39 paid to Federal Government)

[fol. 27]

Missouri Sales Unit Represented	Salesman's S. S. Number	Name of Salesman	Earnings for Year.		
			Up to \$4,000	Excess of \$4,000	Total
R. J. & R.	493-01-1830	Carl A. Ebeling	2,518.43		2,518.43
	492-01-5587	Carl W. Hall	2,006.92		2,006.92
	493-01-1836	John H. Hall	3,000.00	605.21	3,605.21
	492-01-5984	Bernard J. Kelley	3,000.00	441.23	3,441.23
Peters	494-01-3867	Earl E. McDonough	2,469.27		2,469.27
	497-01-6281	Joshua T. Rackam	2,676.90		2,676.90
	493-01-1860	Raymond C. Thatcher	2,268.44		2,268.44
F. Shelby	489-01-2268	Edward S. Alley	2,474.06		2,474.06
	547-07-1871	Frederick W. Richards	607.51		607.51
	492-01-9076	Harry B. Swanson	3,000.00	902.68	3,902.68
Specialty	492-01-9075	Allen K. Umphrey	3,000.00	2,908.54	5,908.54
Total			\$27,021.53	\$4,857.66*	\$31,879.19
Washington State Rate					2.7%
Potential State Tax					\$729.58

\*Contributions subject to \$3,000.00 limitation in 1940  
(3% Federal Tax \$810.65 paid to Federal Government)

## Commissions Paid—1937-1938-1939-1940

Missouri Sales Unit  
Represented

1937

PR. J. & R. . . . . \$11,657.44  
 Peters . . . . . 8,585.04  
 F. Shelby . . . . . 6,266.17  
 Specialty . . . . . 3,000.00

Total

\$29,508.65

1938

R. J. & R. . . . . \$11,036.43  
 Peters . . . . . 8,012.36  
 F. Shelby . . . . . 6,724.32  
 Specialty . . . . . 3,000.00

Total

\$28,863.11

1939

R. J. & R. . . . . \$11,169.24  
 Peters . . . . . 7,669.94  
 F. Shelby . . . . . 7,188.65  
 Specialty . . . . . 3,000.00

Total

\$29,027.83

1940

R. J. & R. . . . . \$10,525.35  
 Peters . . . . . 7,414.61  
 F. Shelby . . . . . 6,061.57  
 Specialty . . . . . 3,000.00

Total

\$27,021.53

Grand Total

\$114,421.12

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[fol. 28] BEFORE THE APPEAL TRIBUNAL  
OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT,  
STATE OF WASHINGTON

Docket No. P-46

FINDINGS OF FACT AND DECISION

In the Matter of a Petition for Hearing by INTERNATIONAL  
SHOE COMPANY

Pursuant to notices to all interested parties, this matter came on regularly for hearing on the 9th day of December, 1941, at Seattle, Washington, before John R. Walsh, Appeal Examiner, who was duly assigned by the Commissioner of Unemployment Compensation and Placement of the State of Washington to hear the said matter.

The Petitioner, International Shoe Company, was represented by Allen Orton (Stern, Orton & Stern) Attorney, 1605 Exchange Building, Seattle.

The Unemployment Compensation Division was represented by William J. Millard, Jr., Assistant Attorney General, and John F. Lindberg, Jr., Attorney, Old Capitol Building, Olympia.

*Statement of the Case:*

A Notice of Assessment was issued pursuant to Section 14(c) of the Unemployment Compensation Act by the Commissioner of Unemployment Compensation and Placement demanding payment from the International Shoe Company of the sum of \$6,000.00 as delinquent contributions due the Unemployment Compensation Fund. A copy of this notice was served upon E. S. Alley, a salesman for the company at Seattle on October 10, 1941, and a copy of the notice was also mailed to the company at St. Louis, Missouri. Thereafter, on October 18, the company filed a special appearance, motion to quash service and objection to jurisdiction.

*Findings of Fact:*

It was stipulated by and between the International Shoe Company and the Commissioner of Unemployment Compensation and Placement through their respective at-



torneys that the Stipulation of Facts, introduced at the hearing and made a part of the record, contains all the facts in the matter.

The facts show the following:

## H .

"International Shoe Company is a Delaware Corporation. It has its principal place of business in the City of St. Louis, Missouri. Its principal business consists of manufacture and sale of boots, shoes and other footwear. It maintains places of business where manufacturing is carried on and from which its merchandise is sold in the states of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York and New Hampshire. Its merchandise is sold through its several selling divisions or branches, the following branches being the only ones doing any sort of business with residents of the State of Washington:

Roberts, Johnson & Rand  
Peters  
Friedmann-Shelby  
Specialty

"It has not a place of business in the State of Washington; maintains no general agent in the State of Washington. It makes no contracts, either of sale or of purchase in the State of Washington. It maintains no stock of merchandise in the State of Washington and makes no deliveries of merchandise in intrastate commerce in the State of Washington. Attached hereto, marked Exhibit 'A,' referred to and by reference incorporated herein as though full set forth, is a statement of all travelling salesmen, residing in, and whose principal activities have been within the State of Washington for the year- 1937, 1938, 1939 and 1940. Said statement gives the names of each employee, the amount earned by the said employees, a compilation of the potential tax due the State of Washington, if any tax be due, the Social Security numbers of the employees and the amount paid to the Federal Government under Title # 9, of the Federal Washington Security Act.

## III

The manner in which the business of International Shoe Company is carried on in the State of Washington, is generally as follows:

"Salesmen are employed from the head office at St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are required as part of their duties to spend certain time each year in St. Louis, Missouri for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the [fol. 30] salesmen rent sample rooms in business buildings and the expenses of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities to which they travel.

## IV

"Such transactions as the International Shoe Company has with persons in business, or who reside in the State of Washington, involving the sale and distribution of its merchandise to merchants in the State of Washington and are conducted as follows:

"Each salesman is given a designated territory in which to solicit orders. The authority of the salesman is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If order(s) are obtained, to transmit them to the office of the International Shoe Company outside the State of

Washington for acceptance or rejection and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F. O. B. shipping point, from outside of the State of Washington. Practically all merchandise shipped by International Shoe Company into the State of Washington is on orders approved in St. Louis, Missouri and shipped therefrom. The merchandise which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which point collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salesman's duties and authority being limited strictly to the solicitation of orders.

"The salesmen are under the direct control and direction of the International Shoe Company and are not permitted to be engaged in an independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company.

## V

"On October 10, 1941, a copy of Notice of Assessment by the Commissioner of Unemployment Compensation and Placement, was delivered to an(d) left with one, E. S. Alley, a salesman of the International Shoe Company, at Seattle, Washington, demanding payment of delinquent contributions or interest, in the sum of \$6000. Said sum was not arrived at by calculation of the wages earned by salesmen of the International Shoe Company within the State of Washington, but was an arbitrary figure set by the Commissioner. E. S. Alley is a salesman of the International Shoe Company, employed upon the terms and under the authority and for the purpose as hereinabove referred to for employees of International Shoe Company within the State of Washington. A copy of the same notice of assessment was also placed in the United States mails, postage fully prepaid, addressed to International Shoe Company at St. Louis, Missouri, on the 10 day of October, 1941. Thereafter, and on the 18th day of October, 1941, International Shoe Company filed with the Department of Unemployment Compensation and Placement, its

special appearance, motion to quash service and objection to jurisdiction."

[fol. 31] The stipulation shows that if contributions are due from the company, the correct amount thereof for the years 1937 through 1940 is the sum of \$3,159.24.

*Conclusions:*

The International Shoe Company, hereinafter referred to as the petitioner, has made a special appearance and a motion to quash the Notice of Tax Assessment and objects to the jurisdiction of the state and the Department of Unemployment Compensation and Placement over the company.

In the briefs filed in support of its contentions it is argued by the petitioner that the service of the notice was ineffectual to confer jurisdiction upon the department. The record shows that a Notice of Assessment was served upon Mr. E. S. Alley, a salesman of the petitioner with his headquarters in Seattle, and a copy of the notice was forwarded by registered mail to the petitioner in St. Louis, Missouri.

Section 14(c) of the Act Provides that the Notice of Assessment shall be served upon the employer in the manner prescribed for the service of summons in a civil action, except that if the employer cannot be found within this state, said notice shall be deemed served when mailed to the delinquent employer at his last known address by registered mail. 2 Remington's Revised Statutes, Section 226, relative to service of process upon a foreign corporation, provides as follows:

"(a) If the suit be against a foreign corporation or non-resident stock company or association, *doing business within the state*, to any agent, cashier or secretary thereof." (Emphasis ours)

The petitioner does not content that notice was not served in the manner provided by law, but does maintain that the agent upon whom process was served had no authority to bind the company and the company is not "doing business within the state," has no license to function as a corporation in the state and may not be subjected to process or to the taxing powers within the state.

The petitioner also contends that it is not an employer within the intent and spirit of the statute as it does not employ anyone in the state.

Section 19(e) of the Act as originally enacted defines "Employing unit" as any individual or type of organization whether domestic or foreign which has or had, subsequent to January 1, 1937, eight or more (and as amended in 1939, one or more) individuals performing service for it within this state.

Section 19(f) (1) of the Act as amended provides as follows:

"(f) 'Employer' means:

"(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week)."

Section 19(g) provides in part as follows:

"(1) 'Employment,' subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under any contracts of hire, written or oral, express or implied.

"(2) The term 'employment' shall include an individual's entire service performed within or both within and without this state if:

"(i) The service is localized in this state; or

"(ii) The service is not localized in any state but some of the service is performed in this state and

"(a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or

"(b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state."

The stipulation of facts shows that the petitioner had eight [fol. 33] or more individuals, residents of this state, performing services for it during the year 1937 and subsequent years. It is contended that they were not employed nor sub-



ject to any control in this state but were employed and controlled by the petitioner at St. Louis, Missouri. However, in our opinion, the services performed by the salesmen of the petitioner constituted "employment" within the meaning of Section 19(g). The men were residents of this state and their services were all performed in this state.

It is not contended by the petitioner that the services of its salesmen would not be "employment" if the corporation was a resident of the state or subject to its jurisdiction. In fact, it seems apparent from the record that under the sections of the Act quoted above the salesmen were in "employment" subject to the Act and contributions are due from the petitioner if it is subject to the jurisdiction of the state. The petitioner contends it is not a resident of the state, is not "doing business in the state" and is not subject to the jurisdiction of the state or this department. However, we are unable to discover any provision in the Unemployment Compensation Act that makes it necessary to find that the employer must be a resident of the state or subject to its jurisdiction in order to make a determination that its employees are in "employment" and that contributions are payable on their wages. The Act makes coverage dependent on the place in which and circumstances under which services are rendered by the employee and not on the location of the employer.

The Act, insofar as it relates to the petitioner, provides, in effect, that any foreign corporation which is an employing unit and which in each of twenty different weeks in the current or preceding calendar year had eight or more individuals performing services for it for wages in this state, including service in interstate commerce, is an employer. The petitioner was an employing unit and had eight individuals performing services for it for wages in [fol. 34] twenty different weeks in 1937 and subsequent years, and these services constituted employment under Section 19(g).

The petitioner, in its argument, states as follows:

"The whole context of the statute contemplates or implies the presence and existence, either actually or constructively, of an 'employer' and his 'employees' within the State and under its jurisdiction. The employment is supposed to be engaged in within the State, and it is upon this employment that the law is intended to protect and provide for."

If we accept that statement as a correct interpretation of what the statute contemplates, we believe it is apparent that the petitioner qualifies as an "employer" under the Act and that contributions are due on remuneration payable to its employees. The employees are actually within the state and the services—solicitation of orders—are performed in the state and, we believe, the employer is constructively, at least, in this state and subject to its jurisdiction.

If, as we believe, the petitioner has qualified as a liable employer under the Act by having eight or more individuals in employment in the state in each of twenty different weeks during 1937, then it has become liable for contributions. It would seem reasonable to hold that in becoming liable for a tax it has become subject to the jurisdiction of the state and is amenable to process in a proceeding to collect that tax.

The petitioner contends that the greater weight of authority holds that a foreign corporation doing business, as is the petitioner here, is not "doing business in the state," within the purview of the statute concerning the service of process. It is further contended that as the corporation has taken no steps to come within the state and to function as a licensed corporation, it is a non-resident and not subject to the jurisdiction of the state.

The petitioner and the Unemployment Compensation Division have cited and discussed in their briefs a number of cases involving the question of "doing business in the state." It seems to us, from what appears to be the leading cases, that the question depends to a considerable extent in [fol. 35] each instance upon the issues involved and the nature of the action. A number of the decisions make a distinction between those cases involving an attempt by the state to regulate or impose a burden upon interstate commerce and those merely attempting to bring the corporations within the jurisdiction of the courts where no question of regulation or undue burden is involved. As stated in the case of *State v. Scott*, 98 Tenn. 254, 39 S. W. 1, as reported in 60 A. L. R. at P. 995:

"Whether or not a foreign corporation is 'doing business' within a state depends upon the issues involved in the proceedings in which the question is raised. Such a corporation may be doing business within the state so as to be subject

to the jurisdiction of the local courts and amenable to services of process therein, and yet not be subject to a statute regulating foreign corporations or prescribing conditions of their doing business within the state."

As stated by the petitioner in its reply brief, it does not quarrel with this distinction (P. 4, L. 14).

The case of *International Harvester Company of America v. Kentucky*, 234, U. S. 579, seems to be one of the leading cases on the question of "doing business" in the state. The company transacted business in a manner similar to that of the petitioner herein and moved to quash service of summons on an agent. The salesmen were allowed, in addition to soliciting orders, to collect money owing the company and to accept notes, which fact may have influenced the court to find that the service was proper. However, in regard to the contention that the corporation was engaged in interstate commerce and therefore not amenable to process, the court said:

"The contention comes to this: so long as a foreign corporation engaged in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business. This is indeed, as was said by the court of appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention.

"True it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce [fol. 36] character. Such corporations are within the State, receiving the protection of its laws, and may, and often do, have large properties located within the state: (cases cited.)

"We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary

process of the courts of the state." (34 Sup. Ct. Rep. P. 946.) (Emphasis ours.)

The court in *American Asphalt Roof Corporation vs. Shankland*, 205 Iowa 862, 249 N. W. 28, stated in commenting on the fact that the salesmen in the International Harvester Case were also authorized to receive notes and money:

*"Such transactions were; however, merely formal acts and involved the exercise of no discretion on the part of the agent, and were always referable to transactions closed by the approval of the order, and, no doubt generally by the delivery of the machines. These transactions are not given significance in what the court terms 'a continuous course of business'—"*

It has been held by our supreme court that the provisions of the law requiring the payment by corporations of an annual license fee before being permitted to commence or maintain an action in any court of this state has reference only to corporations "doing business in this state." (*Lilly-Brackett Company vs. Sonnemann*, 50 Wash. 487). In *Smith & Company vs. Dickinson*, 81 Wash. 465, the court held that the company, whose operations were somewhat similar to those of the petitioner herein, was not doing business in this state within the meaning of the statute; that the legislature in enacting the law did not intend to impose a burden upon interstate commerce and that otherwise the court would be obliged to hold it unconstitutional as in violation of the commerce clause of the federal constitution. It has been decided in a great number of cases that the states cannot impose certain taxes on concerns engaging in interstate commerce, such as a tax on the privilege of doing business in the state, sales taxes, et cetera.

The petitioner contends that under the above ruling of the court the Unemployment Compensation Act would like-[fol. 37] wise be unconstitutional insofar as it attempts to impose a tax upon the petitioner. However, the Act does not impose a tax on the privilege of doing business in the state nor does it attempt to regulate the doing of business, but it provides for an excise tax on the right to have persons in employment in the state.

Neither do we believe the tax imposes a burden upon the interstate commerce business of the petitioner such as



would a license fee or sales tax. The petitioner has paid the taxes provided for in the federal Act; and, had it paid the tax to this state, would have been entitled to credit therefor on the federal tax so that, in effect, the state tax is not imposing any added burden on the petitioner.

The petitioner contends that while the Act (Sec. 19(g)) provides that "employment" shall include services in interstate commerce, it does not apply to employers who are non-residents.

The Unemployment Compensation Act is not an isolated state taxing act. It is part of a federal-state plan for unemployment insurance. The court in *Buckstaff Bath House vs. McKinley*, 308 U. S. 358, states as follows:

"As part of the 'unitary plan,' the Federal Congress has provided:

"No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce" (Section 1606(a) Internal Revenue Code).

The purpose and intent of both the federal and state Acts are clear—to impose taxes on the remuneration paid all workers not specifically exempt and to provide them with unemployment compensation benefits if they become involuntarily unemployed. If the contention of petitioner is correct, we would have the peculiar situation of an employer paying a tax for unemployment compensation; but its employees would be unable to collect benefits even if otherwise eligible. This would be manifestly unfair both to the employers and their employees and is clearly contrary to the intent of the federal Act. While that Act imposes a tax, it does not provide a direct means of paying benefits to workers, but encourages the states to enact their own unemployment compensation laws so that employers may obtain credit on the federal tax for payments made to the states and thus enable their employees to obtain benefits. To hold that individuals employed in interstate commerce could not be brought under a state Act would deprive a large group of workers of the benefits of



unemployment compensation legislation. It seems apparent that it was the intent of the Congress to permit the states to require the payment of the tax on remuneration for services rendered in interstate commerce, provided those services constituted "employment."

A number of other cases have been cited by counsel, but we believe it sufficient to say that, in our opinion, the weight of authority holds that a foreign corporation doing business in the state, as is the petitioner here, is "doing business" so as to make it amenable to process. As the court said in *Lamont v. S. R. Moss Cigar Company*, 218 Ill. App. 435:

"The law that exempts interstate commerce corporations from the need of a state license does not exempt them from service of process issued by a state court; they have no such immunity."

The question has also been raised by the petitioner as to the sufficiency of service on one of its salesmen on the theory that as his activities do not involve the corporation in "doing business in the state" he is not an agent or representative here upon whom process against the corporation may be served.

We have concluded that the petitioner is "doing business in the state" so as to be amenable to process and believe that Rem. Rev. Stat. Section 226, *supra*, providing that service may be made "to any agent . . . thereof," is broad enough to include one of the corporation's salesmen, such as Mr. Alley, upon whom service was made herein. A Notice was also forwarded by registered mail as provided by the Act.

[fol. 39] The Washington State Supreme Court in *State ex rel. Columbia Broadcasting Company vs. Superior Court for King County*, 1 Wn. (2d) 379, in passing on the question of whether service on an agent was good, stated on pages 382-3:

"The question, then, arises whether the Columbia, by reason of its contractual relations with the Queen City, was doing business in this state. The words of the statute, 'any agent,' were intended by the legislature to have a broad meaning, and must be liberally construed to effectuate the legislative intent. While they may not include a day laborer or an employee who has no authority to

represent the corporation in any way other than to discharge his daily task, they must be held to include all agents who represent the corporation in either a general or a limited capacity."

This case is, we also believe, further authority for holding that the petitioner is "doing business in the state." If the Columbia Broadcasting Company was doing business so as to be amenable to process, we believe the petitioner herein would be. Its business has been continuous and in large volume over a number of years and does not consist of a series of isolated transactions and it is, as the court in the above case said:

"—of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is, by its duly authorized officers or agents, present within the state—"

*Decision:*

The motion of petitioner, International Shoe Company, to quash the service of the Notice of Assessment is hereby denied. The petitioner is a liable employer under the Unemployment Compensation Act and subject to the jurisdiction of the State of Washington and the Office of Unemployment Compensation and Placement for the purpose of assessing contributions. The assessment herein in the amount of \$6000.00 is hereby modified; the Commissioner is entitled to have and recover contributions from the petitioner for the period January 1, 1937, through December 31, 1940, in the amount of \$3,159.24.

Dated at Olympia, Washington, this 25th day of January, 1943.

J. R. Walsh, Appeal Examiner. P-46

[fol. 40] STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT

NOTICE OF DECISION

Registered Mail

Date January 25, 1943.

In the Matter of a Petition for Hearing by INTERNATIONAL  
SHOE COMPANY

To: Allen Orton (Störn, Orton & Stern) Attorney.

Interested as: Attorney for petitioner, 1605 Exchange Building,  
Seattle, Washington.

You will find attached hereto a copy of the decision rendered by the Appeal Tribunal in the above-entitled matter.

Section 6 (c) of the Unemployment Compensation Act provides, in part, as follows:

“ \* \* \* The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision on the claim, unless within ten days after the date of notification or mailing of such decision, further appeal is initiated. \* \* \* ”

Date Jan. 25, '43.

Return to Appeal File  
Docket No. A P-46

Form 3811

Nov. 1-4-40

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. Allen Orton  
(Signature or name of addressee)
2. F. G. Sargent  
(Signature of addressee's agent—agent should enter addressee's name on line One above)

Date of delivery Jan. 26, '43, 1943  
U. S. Government Printing Office 16-12421

A party who deems himself aggrieved by this decision may initiate further appeal by filing a Petition for Review

on or before February 4, 1943, at this office or any office of the United States Employment Service. Form for filing same will be supplied upon request.

- Yours very truly, W. G. Preston, Executive Appeal Examiner.

WGP: se

Enc.

CC: Code and File

[fol. 41] STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT

PETITION FOR REVIEW

In the Matter of a Petition for Hearing by INTERNATIONAL  
SHOE COMPANY

To the Commissioner of Unemployment Compensation and  
Placement:

The undersigned hereby requests the Commissioner to review the proceedings heretofore had in the above-entitled matter. Decision of the Appeal Tribunal was rendered in the said matter, on the 25th day of January, 1943. This request for review is made for the following reasons: Appeal Examiner, J. R. Walsh, committed error in denying motion of Petitioner to quash service of notice of assessment and in holding Petitioner a liable employer under the Unemployment Compensation Act and subject to the jurisdiction of the State of Washington and the Office of Unemployment Compensation and Placement, for the purpose of assessing contributions, and in deciding that Commissioner is entitled to have and recover contributions in the amount of \$3,159.24.

Dated at Seattle, Washington, this 2nd day of February, 1943.

International Shoe Company (Signature of petitioner). Interested as Petitioner, by Stern, Orton & Stern, by Allen Orton, Attorneys for Petitioner, 801 Lowman Building.

Rec'd at L. O. No. Seattle on 2-2-43—By Owen.

Received Feb. 3, 1943. Unemployment Compensation Division, Field Section.

Received Feb. 3, 1943. Office of Unemployment Compensation and Placement, US.

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[fol. 42] BEFORE THE COMMISSIONER OF UNEMPLOYMENT COMPENSATION AND PLACEMENT FOR THE STATE OF WASHINGTON

Review No. 378

Docket No. P-46

In the Matter of a Petition for Hearing by INTERNATIONAL SHOE COMPANY

DECISION OF COMMISSIONER

The above employer having petitioned the undersigned Commissioner to review the decision of the Appeal Tribunal entered in this matter on the 25th day of January, 1943, and the undersigned Commissioner having reviewed the proceedings therein and being fully advised in the premises, does hereby adopt the Findings of Fact and Conclusions of Law of the Appeal Tribunal in the above matter, and

It Is Hereby Ordered that the decision of the Appeal Tribunal in the above case dated January 25, 1943, be and the same is hereby affirmed.

Dated at Olympia, Washington, this 11th day of February, 1943.

E. B. Riley, Commissioner of Unemployment Compensation and Placement. (Seal.)



[fol. 43] IN THE SUPERIOR COURT OF KING COUNTY

342190 .

INTERNATIONAL SHOE COMPANY, a Corporation

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT, and E. B. Riley, Commissioner

NOTICE OF APPEAL—Filed March 6, 1943

To: The State of Washington, Office of Unemployment Compensation and Placement; and.

To: E. B. Riley, Commissioner, and

To: The Attorney General of the State of Washington; Attorneys for said Offices:

You, and Each Of You will please take notice that International Shoe Company, a corporation, organized and existing under and by virtue of the laws of the State of Delaware, not engaged in intra-state business within the State of Washington, and without waiving its special appearance and motion to quash as hereinafter referred to, hereby appeals from Notice of Decision rendered on the 25th day of January, 1943, signed by W. G. Preston, Executive Appeal Examiner, and Findings of Fact and Decision of the Appeal Tribunal of the Office of Unemployment and Placement, State of Washington, on the same date by J. R. Walsh, Appeal Examiner, in a matter heard before the Appeal Tribunal, Office of Unemployment Compensation and Placement, State of Washington, entitled: "In the Matter of a Petition for Hearing by International Shoe Company," Docket No. P-46, and from decision of Commissioner E. B. Riley affirming the decision of the Appeal Tribunal, which said decision was dated at Olympia, Washington, on the 11th day of February, 1943, entitled "In the Matter of a Petition for [fol. 44] Hearing by International Shoe Company," Docket No. P-46, Review No. 378, upon the following grounds and for the following reasons:

I

Service of process was ineffectual to confer jurisdiction upon the department of office of Unemployment Placement and special appearance and motion to quash was made in

due time and has been duly preserved at all times during this proceedings by the said department.

## II

International Shoe Company is not engaged and has not been engaged as a foreign corporation or otherwise in the transaction of business within the State of Washington, and has not received nor applied for a license to function as a corporation in this State and is not under the jurisdiction of the State of Washington whereby it may be subject either to service of process within the State of Washington or to the taxing powers of the State of Washington.

## III

International Shoe Company is not an employer within the intent and spirit of the statutes of the State of Washington.

## IV

Appeal Tribunal erred in denying motion of International Shoe Company to quash service of notice of assessment and in holding International Shoe Company liable as an employer under the Unemployment Compensation Act and subject to the jurisdiction of the State of Washington and of the Office of Unemployment Compensation and Placement for the purpose of assessing contributions and in holding International Shoe Company liable to assessments [fol. 45] against said corporation in the sum of \$3,159.24, or any other sum:

## V

The Commissioner erred in denying petition of the International Shoe Company for review of proceedings of Appeal Tribunal and in affirming the decision of the Appeal Tribunal.

International Shoe Company, Appellant, by Stern, Orton & Stern, Its Attorneys, by Allen Orton.

Office and Post Office Address: 801 Lowman Bldg., Seattle, Washington, Elliott 6396.

[File endorsement omitted.]

[fol. 46]

[File endorsement omitted]

## IN THE SUPERIOR COURT OF KING COUNTY

No. 342190

INTERNATIONAL SHOE COMPANY, a Corporation, Appellant,



vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT, and E. B. Riley, Commissioner, Respondent

JUDGMENT—Filed November 10, 1943

The above-entitled cause having come on for hearing before the above-entitled court on the 7th day of October, 1943, for review by said court of the decision of the Commissioner of Unemployment Compensation and Placement entered therein on the 11th day of February, 1943, the appellant, International Shoe Company, appearing and being represented by its attorneys, Stern, Orton & Stern, and the respondent, Commissioner of Unemployment Compensation and Placement, being represented by the Attorney General and George W. Wilkins, Assistant Attorney General, argument having been heard, briefs having been submitted and the court having reviewed the record and on October 22, 1943, having filed its Memorandum Opinion determining that the Office of Unemployment Compensation and Placement and the above-entitled court had jurisdiction over the parties and subject matter involved and that the decision of the Commissioner of Unemployment Compensation and Placement should be upheld and affirmed, and it appearing that due notice has been given of presentment of the within judgment, now, therefore,

It Is Hereby Ordered, Adjudged And Decreed that the [fol. 47] decision of the Commissioner of Unemployment Compensation and Placement heretofore entered in the above-entitled cause on the 11th day of February, 1943, be and the same now hereby is in all respects upheld and affirmed.

Done In Open Court this 10th day of November, 1943.

Hugh Todd, Judge.

Presented by: George W. Williams, Assistant Attorney General, Attorney for Respondent, Commissioner of Unemployment Compensation and Placement.

Due and timely notice of presentment of the within judgment is hereby acknowledged; the within judgment is O. K. as to form; and a copy thereof has been received.

Stern & Stern & Allen Orton, by Allen Orton, Attorneys for Appellant.

[fol. 48]

[File endorsement omitted]

IN THE SUPERIOR COURT OF KING COUNTY.

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT—Filed November 23, 1943

To: The State of Washington, Office of Unemployment Compensation and Placement: and

To: E. B. Riley, Commissioner, and

To: The Attorney General of the State of Washington: Attorneys for said offices:

You And Each Of You, will please take notice that the International Shoe Company, a corporation, organized and existing under and by virtue of the laws of the State of Delaware, not engaged in business within the State of Washington, and without waiving its Special Appearance and Motion to Quash heretofore filed in this proceeding, and feeling itself aggrieved, does hereby appeal to the Supreme Court of the State of Washington from each and every part of that certain Judgment made and entered herein by the above entitled Court on the 10th day of November 1943, wherein and whereby the decision of the Commissioner of Unemployment Compensation and Placement heretofore entered in the above entitled cause on February 11, 1943, was in all respects upheld and affirmed.

Dated at Seattle, Washington this 23 day of November.

[fol. 49] Stern & Stern and Allen Orton, Attorneys for International Shoe Co., a Corp., 801 Lowman Bldg., Seattle, Wash.

Copy received this 23rd day November 1943. Geo. W. Williams, Asst. Atty. Gen.

[fols. 50-51] Bond on Appeal for \$200.00 approved and filed Nov. 24, 1943 omitted in printing.

[fol. 51a] [File endorsement omitted]

[fol 52-1] IN THE SUPREME COURT OF WASHINGTON

No. 29296

INTERNATIONAL SHOE COMPANY, a Corporation, Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT, and E. B. Riley, Commissioner, Respondent

Appeal from the Judgment of the Superior Court of the State of Washington for King County

Hon. Hugh Todd, Judge

APPELLANT'S OPENING BRIEF—Filed February 24, 1944

### Statement of the Case

The proceedings involved in this action were commenced to secure payment of contributions to the Unemployment Compensation Fund of Washington claimed to be due from appellant.

*(Italics occurring in this brief are ours.)*

[fol. 52-2] Appellant is a corporation organized under the laws of Delaware. Its principal place of business is in St. Louis, Missouri. It is engaged in the manufacture and sale of shoes, boots and other footwear. It has no office in the State of Washington. It is not authorized to do business in this State. It has solicitors who take orders in Washington, without authority to accept them. The orders are submitted to the main office, at St. Louis, for its approval. No solicitor has any authority to do anything except forward orders to St. Louis.

The respondent on October 10, 1941, at Seattle, delivered to E. S. Alley, one of the solicitors, a notice of assessment



against the appellant corporation (Commissioner's record, 2). This notice demanded payment by appellant of asserted delinquent contributions and interest to the Unemployment Compensation Fund of this State for the period from January 1, 1937 to December 31, 1940. The assessment was [fol. 52-3] based upon the assertion that these order-takers were employees of appellant in the State of Washington and that appellant was liable for contributions on account of the commissions paid to them. The amount demanded was \$6000, an arbitrary figure not based upon any calculations of the commissions paid.

Within the time limited by the practice established by the Unemployment Compensation Act, on October 18, 1941, appellant filed with respondent a special appearance and motion to quash service of the notice and an objection to the jurisdiction of the commission to levy the assessment (Commissioner's record, 3). The motion to quash was upon the grounds that the corporation was not and is not doing business in this State so as to be subject to process, and, moreover, that E. S. Alley was not an agent with sufficient representative capacity to entitle respondent to serve him with process. The jurisdiction of respondent to levy [fol. 52-4] the assessment was controverted upon the ground that it was not an employer and did not furnish employment in the State of Washington within the meaning of the Unemployment Compensation Act.

At the hearing before the appeal tribunal appointed by the commissioner, the cause was submitted upon an agreed statement of facts (Commissioner's record, 7). This agreed statement of facts showed that, if liable at all, appellant was liable for only \$3159.24, and not the \$6000 arbitrarily assessed. The appeal tribunal on January 25, 1943, denied the motion to quash service of the notice of assessment, overruled the objection to the jurisdiction of respondent to levy the assessment, and held appellant liable for the sum of \$3159.24 (Commissioner's record, 8).

Appellant on February 2, 1943, filed with the commissioner a petition for review, and on February 11, 1943, the [fol. 52-5] commissioner affirmed the decision of the appeal tribunal (Commissioner's record, 10, 11).

On March 6, 1943, appellant filed and served its appeal to the Superior Court of the State of Washington for King County (Tr. 1).

Trial before the court resulted in judgment affirming the decisions of the appeal tribunal and the commissioner (Tr. 10) and from that judgment this appeal is prosecuted (Tr. 12, 13).

The agreed statement of facts, omitting the fabrications of the commissions earned by appellant's solicitors, is as follows:

“I

“This stipulation of facts is made for the purpose of presenting to the appeal examiner and such other tribunals as this matter may come before on appeal, or otherwise, questions raised in this proceeding by the special appearance, motion to quash service and objection to the jurisdiction filed in this proceeding by the International Shoe Company and it is specifically understood and agreed that the stipulation of facts [fol. 52-6] shall not constitute a general appearance by the International Shoe Company, but that it, at all times retains such rights as it may have under the special appearance referred to.

“II

“International Shoe Company is a Delaware Corporation. It has its principal place of business in the City of St. Louis, Missouri. Its principal business consists of manufacture and sale of boots, shoes and other footwear. It maintains places of business where manufacturing is carried on and from which its merchandise is sold in the states of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York and New Hampshire. Its merchandise is sold through its several selling divisions or branches, the following branches being the only ones doing any sort of business with residents of the State of Washington:

Roberts, Johnson & Rand  
Peters  
Friedmann-Shelby  
Specialty

“It has not a place of business in the State of Washington; maintains no general agent in the State of Washington. It makes no contracts, either of sale or [fol. 52-7] of purchase in the State of Washington. It maintains no stock of merchandise in the State of

Washington and makes no deliveries of merchandise in intra state commerce in the State of Washington. Attached hereto, marked Exhibit 'A,' referred to and by reference incorporated herein as though full-set forth, is a statement of all traveling salesmen, residing in, and whose principal activities have been within the State of Washington for the years 1937, 1938, 1939 and 1940. Said statement gives the names of each employee, the amount earned by the said employees, a compilation of the potential tax due the State of Washington, if any tax be due, the Social Security numbers of the employees and the amount paid to the Federal Government under Title No. 9, of the Federal Washington Security Act.

### "III

"The manner in which the business of International Shoe Company is carried on in the State of Washington, is generally as follows:

"Salesmen are employed from the head office at St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are [fol. 52-8] required as part of their duties to spend certain time each year in St. Louis, Missouri, for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and the expenses of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities to which they travel.

### "IV

"Such transactions as the International Shoe Company has with persons in business, or who reside in

the State of Washington, involving the sale and distribution of its merchandise to merchants in the State of [fol. 52-9] Washington and are conducted as follows:

"Each salesman is given a designated territory in which to solicit orders. The authority of the salesman is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If order(s) are obtained, to transmit them to the office of the International Shoe Company outside the State of Washington for acceptance or rejection, and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F. O. B., shipping point, from outside of the State of Washington. Practically all merchandise shipped by International Shoe Company into the State of Washington is on orders approved in St. Louis, Missouri, and shipped therefrom. The merchandise, which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which point collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salesman's [fol. 52-10] duties and authority being limited strictly to the solicitation of orders.

"The salesmen are under the direct control and direction of the International Shoe Company and are not permitted to be engaged in an independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company.

#### "V

"On October 10, 1941, a copy of Notice of Assessment by the Commissioner of Unemployment Compensation and Placement, was delivered to an(d) left with one E. S. ALLEY, a salesman of the International Shoe Company, at Seattle, Washington, demanding payment of delinquent contributions or interest, in the sum of \$6000. Said sum was not arrived at by calculation of the wages earned by salesmen of the International Shoe Company within the State of Washing-

ton, but was an arbitrary figure set by the Commissioner. E. S. Alley is a salesman of the International Shoe Company, employed upon the terms and under the authority and for the purpose as hereinabove referred to for employees of International Shoe Company within the State of Washington. A copy of the [fol: 52-11] same notice of assessment was also placed in the United States mails, postage fully prepaid, addressed to International Shoe Company at St. Louis, Missouri, on the 10th day of October, 1941. Thereafter, and on the 18th day of October, 1941, International Shoe Company filed with the Department of Unemployment Compensation and Placement, its special appearance, motion to quash service and objection to jurisdiction." (Commissioner's record, part 7.)

#### Assignments of Error

1. The court erred in finding that appellant was doing business in Washington so as to be subject to process.

2. The court erred in finding that E. S. Alley had sufficient capacity to represent appellant so that service of process could be made upon him for it.

3. The court erred in finding that the Unemployment Commissioner had jurisdiction to levy an assessment [fol. 52-12] against appellant for contribution to the unemployment compensation fund.

4. The court erred in entering judgment against appellant.

#### ARGUMENT FOR APPELLANT

Appellant Was Not Doing Business in the State of Washington

#### Assignment No. 1

Sec. 14(c) of the Unemployment Compensation Act, Rem. Rev. Stat. §9998-114c, provides that service of notice of delinquent assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in civil actions. Rem. Rev. Stat. §226 (P. C. §8438) provides:

"The summons shall be served by delivering a copy thereof as follows: \* \* \* (9) If the suit be against



a foreign corporation \* \* \* doing business within this state to any agent, cashier or secretary thereof;

It is well settled that to be doing business within the [fol. 52-13] meaning of this section it is necessary that a foreign corporation be doing business of such nature as to manifest its presence in this State. It is not sufficient that it merely carried on its interstate activities here. All that the record in this case—the agreed statement of facts—shows is that appellant sent its solicitors to this State, to take orders. Everything done was incidental to that work. These order-takers do not transact any business. The taking of orders for submission to the home office of the company for its approval is not doing business. This is settled by decisions of this court as well as by the Supreme Court of the United States. The order-takers do not even consummate the sale—the sales are not made in the State of Washington; they are made in St. Louis.

Appellant has no place of business in this state. It maintains no general agent here. It makes no contracts either [fol. 52-14] of sale or purchase in Washington. It maintains no stock of merchandise here. It makes no deliveries in intrastate commerce in this state (Agreed statement of facts page 2).

The solicitors of orders in this state are employed at the head office of appellant in St. Louis, Missouri. They work under the direct supervision of sales managers in St. Louis (Agreed statement, 2). They are under the direct control and direction of appellant (Agreed statement, 3). They are required as a part of their duties to spend a certain time each year in St. Louis to receive direct personal instructions as to their duties to learn of shoes they will be permitted to offer for sale, to learn the methods of sale and the conditions of sale, and to receive information as to the construction and the new types and kinds of shoes which are to be offered by them (Agreed statement, 2).

Their authority is limited to exhibiting samples of merchandise [fol. 52-15] for which they solicit orders; these samples consist of one shoe of a pair, no sales are made from the samples. The solicitors endeavor to procure orders upon prices and terms fixed by appellant. If orders are obtained, the solicitors forward them to the offices of

appellant outside Washington for acceptance or rejection (Agreed statement, 3).

No solicitor has power or authority to bind appellant to any contract or finally to conclude any transactions in appellant's behalf. The solicitors' duties and authority are limited strictly to the solicitation of orders (Agreed statement, 3).

If any orders obtained by the solicitors are acceptable to appellant, then the orders are filled by merchandise shipped from outside this state. This merchandise is shipped F. O. B. shipping point. All of the shipments coming into this state originate outside the state and almost all of them originate at St. Louis, after being approved and accepted there [fol. 52-16] (Agreed statement, 3). (Appellant has places of manufacture in several states, Agreed Statement, 1.)

All of the goods coming into Washington are invoiced at the point of shipment. All invoices are payable at the place of shipment. All collections are made at the point of shipment (Agreed statement, 3).

Some of the solicitors rent sample rooms in business buildings and the cost of these is paid by the solicitors, they being reimbursed on expense accounts by appellant. Other solicitors maintain no permanent sample rooms but rent rooms in hotels or business buildings in various cities to which they travel (Agreed Statement, 2 and 3).

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within [fol. 52-17] the State or district where service is attempted."

*People's Tobacco Co. v. Amer. Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233, 62 L. ed. 587, Ann. Cas. 1918C, 537.

In the case of *State ex rel. Paraffine Companies, Inc. v. Superior Court*, 184 Wash. 69, 49 P. (2d) 929, was involved the question of whether or not the Paraffine Companies were transacting business in Thurston County. The Companies' principal place of business was in King County. It sent salesmen throughout the state to call upon prospective purchasers and receive orders to be transmitted to Seattle.

If the orders were approved by the credit department the sales were made in the Seattle office. The salesmen had no authority to bind the Companies to sales, and all orders received were subject to approval. Deliveries were made either from the Seattle warehouse or the Companies' factory in California. The Companies sold their product to three merchants in Olympia. Two of these merchants were [fol. 52-18] solely retail dealers. One of them, the Washington Veneer Company, was supplying other dealers. The representatives of the Companies went with representatives of the Veneer Company to visit various dealers in Thurston County. These dealers were told that the products of the Paraffine Companies would be handled by the Veneer Company and would supply these dealers. The Veneer Company supplied the dealers, in accordance with those statements. The Veneer Company ordered goods through salesmen of the Paraffine Companies or by mail, and made payments every thirty days or less. In holding that the Companies were not transacting business in Thurston County the court said:

"While the veneer company is referred to as a distributor, it purchases from the Paraffine Companies at a discount, in the course of trade, and resells to its own customers at a profit. The other two concerns purchase, in ordinary course, the products that are needed to supply their immediate customers. While [fol. 52-19] the Paraffine Companies' salesmen stimulate trade and solicit the use of its products; purchases are made by the Olympia dealers at the Seattle office.

"We are clear that the Paraffine Companies is not transacting business within Thurston County, as the term has been defined by this court."

The case of *Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594, involved a suit against a Louisiana corporation in the federal court in New York. The Whitney Central National Bank was a Louisiana corporation and had its usual place of business at New Orleans. It was claimed that the following established the fact that the Whitney Central National Bank was doing business in New York so as to subject it to process in New York: It had six correspondent banks in New

York. In each of them it carried continuously an active regular deposit account. In addition these correspondent banks conducted other transactions for the Whitney Central [fol. 52-20] National Bank. These included the following: There was paid in New York, through the correspondent banks, drafts drawn by the Whitney Central National Bank against letters of credit issued by it at New Orleans. The correspondent banks received in New York, from brokers and others, securities in which the Whitney Central National Bank or its depositors were interested, and delivered these securities. The correspondent banks made payment to persons in New York for such securities. The correspondent banks held such securities on deposit in New York for long periods and arranged a substitution of securities. The correspondent banks under specific instructions from the Whitney Central National Bank cashed checks drawn upon the latter bank by third parties with whom it had no banking or deposit relations. The correspondent banks received in New York, from third persons with whom the Whitney Central National Bank had no banking relations, [fol. 52-21] deposits of money for the account of customers of the Whitney Central National Bank.

The United States Supreme Court stated that these additional transactions involved the relationship of principal and agent. The court said, referring to these transactions:

"Superimposed upon the simple relation of bank and depositors are numerous other transactions which necessarily involve also the relationship of principal and agent."

Notwithstanding this declaration, the Supreme Court held that the Whitney Central National Bank was not doing business in New York of a character to render it present in that State subject to the service of process. The court said:

"The Whitney Central had what would popularly be called a large New York business. The transactions were varied, important and extensive. But it had no place of business in New York. None of its officers or employees was resident there. Nor was this New York [fol. 52-22] business attended to by any one of its officers or employees resident elsewhere. Its regular New York business was transacted for it by its corre-

spondents—the six independent New York banks. They, not the Whitney Central, were doing its business in New York. In this respect their relationship is comparable to that of a factor acting for an absent-principal. The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like *qui facit per alium facit per se*. It flows from the fact that the corporation itself does business in the State or district in such a manner and to such an extent that its actual presence there is established. That the defendant was not in New York and, hence, was not found within the district is clear.”

*Bank of America v. Whitney Central National Bank*, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594.

[fol. 52-23] E. S. Alley Was Not an Agent Qualified to Receive Process

#### Assignment No. 2

E. S. Alley is a solicitor for the International Shoe Company. His authority is limited to exhibiting samples, endeavoring to procure orders, transmitting the orders to the office of the International Shoe Company outside of the State of Washington, for acceptance or rejection. His duties and authority are limited strictly to the solicitation of orders.

When Mr. Alley has received an order and transmitted it to St. Louis or some other office of appellant—outside of the state of Washington—his duties are at an end. He has exhausted whatever authority he possessed. He has nothing to do with the shipment of the order. He has nothing to do with the delivery of the goods in Washington. He has nothing to do with the collections. Except for the ability to display samples, he has done nothing, when he takes [fol. 52-24] and forwards the order, which some stranger could not have done. Any one, not even connected with appellant could submit to the home office of appellant orders for its approval or rejection.

It is impossible to conceive how Mr. Alley could have less authority over the business affairs of appellant.

Even though by strained reasoning it could be held that appellant was doing business in this state it could not be so held simply by a consideration of the work which Mr.



Alley does. All that he does is simply incidental to the carrying out of his work of receiving and forwarding orders.

"The person upon whom the service is made must be an agent who represents, and derives his authority from, the corporation defendant, and the authority thus conferred and exercised must be an actual authority, and not one created by implication."

[fol. 52-25] *Arrow Lumber etc. Co. v. Union Pac. R. Co.*, 53 Wash. 629 at 631, 102 Pac. 650.

"The so-called agent is nothing more than a mere advertiser, whose duty it is to explain to intending travelers and shippers of freight the advantages of traveling or shipping over the respondent's lines. He possessed no power to sell tickets, make freight rates, or otherwise obligate the company in any form of contract, and it is difficult to understand what legal obligation he could create on its behalf."

*Rich v. Chicago B. & Q. R. Co.*, 34 Wash. 14 at 17, 74 Pac. 1008.

## The International Shoe Company Was Not Subject to the Taxing Power of the State

### Assignment No. 3

-It is evident from what has been said and from the record that all that appellant conducts in the State of Washington is interstate commerce. Its solicitors are employed at St. Louis, Missouri. The employment contracts are made in St. Louis. The employees are subject to direction from St. [fol. 52-26] Louis. Any tax upon the right of appellant to employ its solicitors would be a tax and a burden upon employment which is interstate commerce. The power to tax is the power to destroy. If this State possesses the power to tax, if the commissioner has jurisdiction to levy the tax assessed in these proceedings, then this State has the power to destroy the right of appellant to have any employees in this State at all.

Article I, Section 8, of the Constitution of the United States provides:

"The Congress shall have power . . . to regulate commerce . . . among the several states."

The Fifth Amendment:

"No person shall . . . be deprived of . . . property without due process of law."

The Fourteenth Amendment:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the [fol. 52-27] United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

"The power of taxation, however vast in its extent, is necessarily limited to subjects *within* the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

*Cleveland P. & A. R. R. Co. v. Commonwealth of Pennsylvania*, 15 Wall. 300, 21 L. ed. 179.

In the case of *Puget Sound Stevedoring Co. v. Tax Commission of Washington*, 302 U. S. 90, 82 L. ed. 68, there was under consideration the right of this State to collect the use and occupation tax from the business of stevedoring. The contention of the stevedoring company, that in loading and unloading vessels engaged in hauling interstate shipments the workmen and the company were engaging in interstate commerce and therefore the State was without [fol. 52-28] jurisdiction to levy the tax, was upheld. The court said:

"No one would deny that a crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel (Citations omitted). A longshoreman busied in the same task bears the same relation as the crew to the commerce he serves. . . ."

"The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of gross receipts. Decisions to that effect are many and controlling."

*Puget Sound Stevedoring Company v. Tax Commission of the State of Washington*, 302 U. S. 90, 82 L. ed. 68.

In *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 62 L. ed. 632, at page 636, where Massachusetts was attempting to collect an excise tax from Cheney Bros. Co., the court stated the facts of the case and the law pertaining thereto, in the following language:

"This is a Connecticut corporation whose general [fol. 52-29] business is manufacturing and selling silk fabrics. It maintains in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The salesmen and the office rent are paid directly from Connecticut, and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the state.

"We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. *Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation.* (Citations omitted). Nor is the situation changed by inferring, as the state court did, that [fol. 52-30] orders from customers in Connecticut sometimes are taken by salesmen connected with the Boston office, and, after transmission to and approval by the home office, are filled by shipments from the company's mill in Connecticut to such customers. In such cases it doubtless is true that the resulting sale is local to Connecticut; *but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of the nature of interstate intercourse than of business local to Massachusetts, and affords no basis for an excise tax in that state.* *International Textbook Co. v. Pigg*, 217 U. S. 91, 106, 107, 54 L. ed. 678, 685, 27 L. R. A. (N.S.) 493, 30 Sup. Ct. Rep. 481.

18 Ann. Cas. 1103. *We think the tax on this company was essentially a tax on doing an interstate business, and therefore repugnant to the commerce clause.*" (Italics supplied.)

*Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 62 L. ed. 632.

In the case of *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 69 L. ed. 982, was involved the right of Portland, Oregon, to collect a license fee from the hosiery company. [fol. 52-31] Its solicitors went from house to house soliciting orders and accepting them. They also collected a deposit of \$1 on each sale, which was the solicitor's compensation. In holding that the enforcement of this ordinance should be enjoined, the Supreme Court said:

"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause (Citing cases). The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. Manifestly, no license fee could have been required of appellant's solicitors if they had traveled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden of interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them."

*Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 69 L. ed. 982.

[fol. 52-32] In the case of

*Matson Navigation Co. v. State Board of Equalization of California*, 297 U. S. 441, 80 L. ed. 791.

was involved the right of California to levy a tax on corporations for the privilege of exercising their corporate franchises within that State. The Supreme Court said, at page 446:

"A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question."

In the case of *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P. (2d) 385, the plaintiffs had brought suit to recover the occupation tax which they had paid and to restrain the State Tax Commission from collecting future taxes. The plaintiffs were all foreign corporations manufacturing motion pictures. Each had a branch office in Seattle, in charge of a manager. The manager solicited applications for leases of picture films, sub-[fol. 52-33] ject to approval by the home office of the plaintiffs. The court held that the transactions of the plaintiffs were in interstate commerce and that the State was without power to levy the tax against them.

### Attorneys Fees

Sec. 6 of the Unemployment Compensation Act, Rem. Rev. Stat. §9998-106i, provides that no attorney fees shall be charged or received for any appeal to the courts from a decision involving the *right of an employee* to receive benefits under the act, except upon approval of the court.

Sec. 14 (c) of the act, Rem. Rev. Stat. §9998-114e, provides that upon appeal by an employer from a notice of *delinquent assessment* the same procedure shall be followed as in appeals from decisions as to the rights of employees.

It is believed that the limitations as to attorney fees prescribed with reference to appeals relating to employees' [fol. 52-34] *rights* do not apply to an appeal from a notice of *delinquent assessment*. One reason for this is that there is no provision that attorney fees on appeal from *delinquent assessment* shall be assessed against the compensation fund, as in the case in appeals from decisions involving *employees' rights*. However, out of an abundance of caution, if the court disagrees with this conclusion, it is requested that this court fix appellant's attorney fees in this court under such procedure as the court may direct.

### Conclusion

It is submitted that under the facts disclosed by the record here it cannot be held that appellant is doing business in this State so as to subject it to process.

It is also clear that even though appellant could be deemed to be doing business in this State, E. S. Alley is not an [fol. 52-35] agent with sufficient representative capacity to authorize service of process to be made upon him on behalf of appellant.



Also, there is no jurisdiction on the part of the Commissioner of Unemployment Compensation to levy the tax here involved upon appellant. To permit such a tax is violative of all the provisions of the United States Constitution above referred to.

Respectfully submitted, Stern & Stern and Allen Orton and T. M. Royce, Attorneys for Appellant.

[fol. 52-36] *Due and timely service of the within brief, by the receipt of three copies thereof, is hereby admitted this 23 day of February, 1944.*

Smith Troy, Attorney General; George W. Wilkins, Ass't Att'y Gen., Attorneys for Respondents.

[fol. 53] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 29296. En Banc

INTERNATIONAL SHOE COMPANY, a Corporation, Appellant,

v.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT, and E. B. Riley, Commissioner, Respondent

OPINION—Filed January 4th, 1945

The proceedings involved in this action were commenced by the department of unemployment compensation and placement, hereinafter referred to as the department, to recover contributions claimed to be due from International Shoe Company, hereinafter referred to as appellant, for the period of January 1, 1937, through December 31, 1941. No contention is made by appellant that the amount of the contributions found to be due by the commissioner of unemployment compensation and placement and the superior court of King county was not correct, if appellant is liable for any contributions.

Notice of assessment was personally served upon Edward S. Alley, a salesman employed by appellant, in King county, Washington, on October 10, 1941. On October 18th appellant appeared specially before the department, and moved to quash the service upon Mr. Alley upon the following grounds: (1) That service of the notice of assessment upon Mr. Alley was not good service on appellant. (2) That appellant is a corporation, organized and existing under and by virtue of the laws of Delaware, and is not engaged in doing business within the state of Washington; that it has no agent or other person within this state upon whom service of process may be made; that it is doing only inter-[fol. 54] state business. (3) That appellant is not an employer, and does not furnish employment within the state of Washington, within the meaning of those terms, as defined by the unemployment compensation act.

Appellant requested a hearing, and pursuant to such request the matter came on for hearing before the appeal tribunal upon stipulated facts, supplemented by the testimony of Edward Alley. On January 25, 1943, the appeal tribunal rendered its decision, wherein it denied appellant's motion to quash and held the commissioner was authorized to recover from appellant for the period above mentioned contributions in the sum of \$3,159.24.

A petition was duly filed with the commissioner to review the decision of the appeal tribunal. The commissioner thereafter reviewed such decision, and on February 11, 1943, entered an order confirming the decision of the appeal tribunal.

An appeal was taken from the decision of the commissioner to the superior court for King county, which thereafter, on November 10, 1943, entered judgment affirming the decision of the commissioner. This appeal is from the judgment entered by the superior court, and as a basis for such appeal appellant assigns error upon the finding of the trial court that appellant was doing business in Washington so as to be subject to process; upon the finding that Edward S. Alley had sufficient capacity to represent appellant so that service of process could be made upon him; upon the finding that the commissioner had jurisdiction to levy an assessment for contributions to the unemployment compensation fund; and upon the entry of judgment against appellant.

While we do not believe the testimony of Mr. Alley adds anything to the stipulated facts, we mention his testimony because the record shows the facts to be considered were those stipulated, plus the testimony of Mr. Alley.

The pertinent facts may be stated as follows: Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri. Its principal business consists of the manufacture and sale of boots, shoes and other [fol. 55] footwear. It maintain places of business where manufacturing is carried on, and from which its merchandise is sold in the states of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York and New Hampshire. Its merchandise is sold in Washington through its several selling divisions or branches, the following branches being the only ones doing any sort of business with residents of the state of Washington: Roberts, Johnson & Rand, Peters, Friedman-Shelby and Specialty. So far as appears from the record, these branches seem to be no more than designated sales units to handle appellant's products.

Appellant has no place of business in this state. It makes no contracts, either for sale or purchase in this state. It maintains no stock of merchandise in this state, and makes no deliveries of merchandise in intrastate commerce in this state.

In its business in the state of Washington for four years, 1937 through 1940, appellant employed from eleven to thirteen salesmen, all of whom resided in the state, and whose principal activity was the solicitation of orders for appellant's merchandise to be delivered in this state. Commissions paid to these salesmen for the four years indicate the volume and extent of business carried on by the salesmen for appellant. It is evident that this business did not consist of isolated transactions, but was a continuous course of business, the total commissions paid for 1937 being \$36,098.19, for 1938, \$32,075.63, for 1939, \$33,846.44, and for 1940, \$31,879.19, or a total for commissions for the four year period, \$133,899.45.

These salesmen are under the direct supervision and control of sales managers, the latter being located in St. Louis. Each salesman has a designated territory within the state. Salesmen have a sample line consisting of one shoe of a pair. These samples belong to appellant, and are given to the salesmen to display to prospective purchasers. Some

of the salesmen rent sample rooms in business buildings, and some maintain no permanent sample rooms, but rent [fol. 56] rooms in hotels or business buildings in the various cities in their territory. The expense of such rental is paid by the salesmen, and they are later reimbursed by appellant. The authority of the salesmen is limited to exhibiting to merchants who are probable buyers samples of merchandise for which they solicit orders, endeavoring to procure orders on prices and terms fixed by appellant. If orders are obtained, the salesmen transmit them to appellant's office in St. Louis, for acceptance or rejection. If the orders are accepted by appellant, the merchandise called for by such orders is shipped f. o. b. shipping point, from outside the state of Washington. No salesman has authority to bind appellant with any contract, or to finally conclude any transaction in its behalf, nor can he make collections. Salesmen are not permitted to engage in an independently established trade, occupation, profession, or business of the same nature as is involved in their employment by appellant.

The only thing which it can be said Mr. Alley's testimony added to the stipulated facts may be gathered from his somewhat detailed account of the conventions held each year at St. Louis, which the salesmen are required to attend, their expenses being paid by appellant. From this testimony it appears that a regular program is followed by appellant through this contact with its salesmen, to keep the company's business at a high level, to eliminate, so far as possible, difficulties arising in the particular territories, and to discuss the credit of Washington purchasers and customers with whom appellant is doing business. The company's business in this state is apparently discussed in great detail, and the salesmen are instructed as to the line of shoes they are to offer to the trade, the method of selling, and conditions of selling. They also receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade.

[fol. 57] Rem. Supp. 1941, § 9998-114c, provides:

"At any time after the commissioner shall find that any contribution or the interest thereon have become delinquent, the commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except

that if the employer cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last known address by registered mail."

Rem. Rev. Stat., § 226, provides the manner of service of summons in civil actions. Subdivision 9 of § 226 provides that if the suit be against a foreign corporation doing business within this state, the summons shall be served by delivery of a copy thereof to *any agent, cashier or secretary* thereof.

In the instant case, both methods of service provided for by § 9998-114c, *supra*, were followed.

The principal question with which we are here concerned is whether or not appellant was doing business in the state of Washington so as to make it amenable to process of the courts of this state.

Before discussing some of the authorities dealing with the question last above stated we desire to call attention to the fact that we shall first consider the specific question of whether or not appellant is so doing business within this state as to make it amenable to process by the courts of this state, and not whether it is so doing business as to require it, in certain instances, to pay the annual license fee required by our statutes, as was the case in *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133. It is true that in the cited case the court does not point out the distinction above made, but the facts upon which the opinion is based and the statutes cited clearly show that the court was there considering the question of whether or not *Smith & Co.*, a foreign corporation, was so doing business within this state as to require it to plead and prove that it had paid the annual license fee required by the statute before it could bring an action in this state.

[fol. 58] We are of the opinion the *Dickinson* case, *supra*, is not contrary to the conclusion we have reached, on the question here presented, nor have we been cited to any case decided by this court which, in our opinion, is contrary to such conclusion, when the distinction above pointed out is kept in mind, a distinction which is clearly made in the leading and often cited case of *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, to which further reference will be made.

We have in several cases, stated that the mere bringing of an action in this state by a foreign corporation, does not



constitute doing business in this state, so as to require such corporation to pay an annual license fee. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505; *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133; *Alaska Pac. Nav. Co. v. Southwark Foundry & Machine Co.*, 104 Wash. 346, 176 Pac. 357; *Singmaster v. Hall*, 98 Wash. 134, 167 Pac. 136; *St. Anthony & Dakota Elevator Co. v. Turner*, 132 Wash. 419, 232 Pac. 288; *Proctor & Gamble Co. v. King County*, 9 Wn. (2d) 655, 115 P. (2d) 962. In the case last cited we stated:

"We have consistently held that statutes providing that no corporation shall commence any action in this state without alleging and proving that it has paid its annual license fee, refer only to corporations doing business within this state, and do not apply to a non-resident corporation simply bringing an action in this state, as that does not constitute doing business within this state. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505; *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133."

The above cited cases are not in point from a factual standpoint, nor are they in point when the question to be considered is whether or not the foreign corporation was doing business in this state so as to be amenable to process. [fol. 59] Later in this opinion we shall deal with the question of whether or not the exaction of the payment required under the unemployment compensation act is an unlawful burden upon interstate commerce.

We here also desire to emphasize that in reaching the conclusion drawn on this first question, we have not alone considered the volume of business transacted, but we have considered all the facts stipulated.

We desire first to call attention to an article in volume 35 of *Michigan Law Review*, under the general heading "Comments," on page 969. This article states the early theory as expressed by Justice Taney "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created," and some of the reasons why the several states have passed statutes providing for service of process upon foreign corporations which are "doing business" within the state. The article further states:

"The factor of 'doing business' within a state was not recognized as establishing a new basis for jurisdiction but

was explained upon the theory of consent. The reasoning was that since the state had the power to refuse admission of foreign corporations which were not agents of the Federal government or corporations engaged in interstate commerce, the state could as an implied condition to the corporation's entering the state make a foreign corporation amenable to process there. The corporation's consent to the statutory condition was implied upon its entering the state. Later another theory, called the 'actual presence' theory, was developed. Under this theory it was said that if a corporation was 'doing business' in a state it must be present in that state. The use of these two fictional theories, which extended the law of natural persons to make it adaptable to corporations, is largely responsible for the confusion occurring in this field."

[Vol. 60] The article further refers to and discusses three leading cases on this question, namely, *Green v. Chicago, B. & Q. Ry. Co.*, 205 U. S. 530, which holds that the corporation was not "doing business" in Pennsylvania, and *International Harvester Co. v. Kentucky*, 234 U. S. 579, and *Tauza v. Susquehanna Coal Co.*, 220 U. S. 259, 115 N. E. 915, which hold that the respective corporations were doing business in the state where process was served.

Typical of the early cases based upon the consent theory is *Lafayette Ins. Co. v. French*, 59 U. S. 404.

The corporate presence theory was apparently formulated by Mr. Justice Brandeis in the case of *Philadelphia & Reading Co. v. McKibbin*, 243 U. S. 264, in these words:

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is *present there*." (Italics ours.)

In *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, the following general rule was announced:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted."

In *State ex rel. Columbia Broadcasting Co. v. Superior Court*, 1 Wn. (2d) 379, 96 P. (2d) 248, we cited with approval the general rule as above stated, but in view of what was stated in this same case in 5 Wn. (2d) 711, 105 P. (2d) 70, the decision in 1 Wn. (2d) cannot be considered as authority, other than as it expresses the opinion of the judges who signed that opinion.

The leading case on the question of what constitutes doing business within a state by a foreign corporation so as to justify the courts of that state in taking jurisdiction of complaints against it, is *International Harvester Co. v. Kentucky*, 234 U. S. 579, hereinbefore referred to. The case [fol. 61] presented the question of the sufficiency of the service of process on an alleged agent of the Harvester Co. in a criminal proceeding in a county court of Kentucky in which an indictment had been returned against the Harvester Co. for an alleged violation of the anti-trust laws of Kentucky. It is conceded in the cited case that whether the person upon whom process was served was one designated by the law of Kentucky as an agent to receive summons on behalf of the company was a question within the province of the court of appeals of Kentucky to finally determine. The court stated the first question to be determined was whether, under the circumstances shown in that case, the Harvester Co. was carrying on business in Kentucky in such a manner as to justify the courts of that state in taking jurisdiction of complaints against it. The opinion states:

"For some purposes a corporation is deemed to be a resident of the state of its creation, but when a corporation of one state goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that state. The mere presence of an agent upon personal affairs does not carry the corporation into the foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the state . . . Each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the state."

The facts upon which the court determined that the corporation was doing business in Kentucky were as follows:

"Travelers negotiating sales must not hereafter have any headquarters or place of business in that state, but may reside there.

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the state, and all goods must be shipped from outside of the state after the orders have been approved. Travelers do not have authority to make a contract of any kind in the state of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the company a debt, *they may receive the money, or a check, or a draft for the same* but they do not have any authority to make any allowance or compromise any disputed claims. . . . All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the state. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that state, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky." (Italics ours.)

The opinion states:

[fol. 62] "Upon this question the case is a close one; but upon the whole we agree with the conclusion reached by the court of appeals, that the Harvester Company was engaged in carrying on business in Kentucky. We place no stress upon the fact that the Harvester Company had previously been engaged in doing business in Kentucky and had withdrawn from that state for reasons of its own. . . . *Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction.* The agents not only solicited such orders in Kentucky, but might there receive payment in money; checks or drafts. They might take

notes of customers, which notes were made payable, and doubtless, were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state." (Italics ours.)

We call attention at this point to the fact that while in the cited case the court stated the agents might receive payment in money, checks or drafts, and might take notes of customers, payable at Kentucky banks, the court did not emphasize these latter facts in holding that the company was carrying on a *continuous course of business*.

The cited case distinguishes the case of Green v. Chicago B. & Q. Ry. Co., 205 U. S. 530, often cited to sustain the contention that a foreign corporation is not doing business within a state where it appears that in substance such business consisted of nothing more than the solicitation of orders.

Some three years after the decision in the International Harvester Co. case, *supra*, Mr. Justice Day, who wrote the opinion in that case, wrote the opinion in the case of People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, *supra*. While we are of the opinion, from an examination of the cited case, that the decision might well have been sustained upon the theory that the authority of Irby, the agent of American Tobacco Co. upon whom service was attempted to be made, had been revoked prior to the time of such attempted service, yet the court, as disclosed by the opinion, did state that the American Tobacco Co. was selling goods in Louisiana to jobbers, and sending its drummers into that state to solicit orders from the retail trade, [fol. 63] to be turned over to the jobbers, the charges being made by the jobbers to the retailers. These agents were not domiciled in the state, and did not have the right or authority to make sales on account of the defendant company, collect money or extend credit for it. The court, after the statement hereinabove-referred to relative to the attempted service on an unauthorized agent, further states:

"Upon the broader question, we agree with the district court that the American Tobacco Company at the time of the attempted service was not doing business within the



state of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. \* \* \*

"As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it."

The court, after referring to the *International Harvester* case, *supra*, held that the district court properly concluded that the attempted service on Irby should be quashed.

From the cited cases we reach the conclusion that while mere solicitation of business within a state by the agents of a foreign corporation does not constitute doing business so as to make the corporation amenable to process by the courts of that state, solicitation, together with certain other acts, will be sufficient to render the corporation subject to process. So our inquiry now is: What additional acts will be deemed sufficient for this purpose?

In 1917, Justice Cardozo (then judge of the New York Court) wrote the often-cited opinion in the case of *Tauza v. Susquehanna Coal Co.*, 226 N. Y. 259, 115 N. E. 915. The court sums up the facts in the cited case in the following words:

[fol. 64] "In brief, the defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistants, and through these agencies systematically and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York.

"To do these things is to do business within this state in such a sense and in such a degree as to subject the corporation doing them to the jurisdiction of our courts."

It might be added that all orders secured through the New York office were subject to confirmation at the home office in Pennsylvania. No person connected with the New York office had authority to receive payment for shipments of coal, or to receive or endorse checks. At the conclusion of a discussion of the International Harvester case, *supra*, the court stated:

"That case goes farther than we need to go to sustain the service here. It distinguishes *Green v. Chicago, B. & Q. Ry. Co.* (205 U. S. 530) where an agent in Pennsylvania solicited orders for railroad tickets which were sold, delivered and used in Illinois. *The orders did not result in a continuous course of shipments from Illinois to Pennsylvania. The activities of the ticket agent in Pennsylvania brought nothing into that state.* In the case at bar, as in the International Harvester case, there has been a steady course of shipments from one state into the other. The business done in New York may be interstate business, but business it surely is." (Italics ours.)

The court further stated:

"In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is *not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here.* \* \* \* If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, *then, whether its business is interstate or local, it is within the jurisdiction of our courts.* \* \* \* *The nature and extent of business contemplated by licensing statutes is one thing. The nature and extent of business requisite to satisfy the rules of private international law may be quite another thing.*

\* \* \* Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done.

*All that is requisite is that enough be done to enable us to say that the corporation is here.*" (Italics ours.)

The holding in the *Tauza* case may be boiled down to this, that where there is a systematic and regular solicitation of orders by an agent or agents of the corporation, resulting in a continuous shipment of goods into the state where the agents are operating, together with the maintenance of a permanent office in the state by the corporation, the corporation can be said to be doing business in that [fol. 65] state so as to make it amenable to process by the courts of such state.

The cases dealing with the question here presented are multitudinous. While it is probably true that most of the cases which hold the corporation was doing business in the state so as to make it *amenable to process* have some slight activity on the part of the agent in addition to the solicitation of orders resulting in a continuous flow of the corporation's products into the state, yet it seems to us the basic fact upon which the courts have determined that the corporation was doing business was the regular and systematic solicitation of orders by the agent, resulting in the continuous flow of the corporation's products into the state by means of interstate carriers.

The following are typical cases holding that the corporation was doing business in the state where service was attempted to be made. From our discussion of these cases will appear what facts, in addition to mere solicitation, the courts considered in determining that the corporation was doing business in the state. It will also appear from some of the decisions that a regular and systematic course of solicitation of orders by the agent of the corporation, resulting in a continuous flow of the corporation's products into the state, should be and is sufficient to warrant the court in holding the corporation was doing business in the state. Many of these cases cite and rely upon the *International Harvester* case. *Lamont v. Moss Cigar Co.*, 218 Ill. App. 435; *George A. Hormel & Co. v. Ackman*, 117 Fla. 449, 158 So. 171, where in addition to soliciting orders the agent made some collections; *Wheeler v. Boyer Fire Apparatus Co.*, 63 N. D. 403, 248 N. W. 521, where the agent's authority consisted in soliciting orders and making collections (this case refers to and quotes from the *International*

Harvester case, *supra*, *Tauza v. Susquehanna Coal Co.*, *supra*, and *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, of which more will be said later), *Dobson v. Maytag Sales Corp.*, 292 Mich. 107, 290 N. W. [fol. 66] 346; *International Shoe Co. v. Lovejoy*, 219 Iowa 204, 257 N. W. 576, wherein the court stated:

"It appears from the foregoing recital of the facts that, in addition to the solicitation of orders from customers for shoes, *Sommrerhauser* sought to induce *Rattenhoff* and others to engage in the shoe business. This appears to have been a part of his duties as a salesman. He was authorized to receive checks in payment of accounts and to transmit the same to petitioner, but not to cash the same or to receive money. Petitioner did not, in a general sense at least, maintain an office or place of business in this state. It did, however, permanently maintain a sample or display room in a hotel in Des Moines which was visited by actual or prospective customers to whom sales of merchandise were made. This method of transacting the business amounted to something more than the mere solicitation of orders. The practice of aiding, if not inducing, others to establish stores and engage in the shoe business in this state also amounted to more than the mere solicitation of orders."

In the case of *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, hereinbefore referred to, the defendant was a foreign corporation having its principal place of business in Kansas City, Missouri. The agent on whom service was made was a traveling salesman, with authority to solicit orders which were forwarded to the home office for acceptance. *He had no authority to accept orders, make contracts, receive payment of any kind, and maintained no office or permanent place of business within the state of Iowa.* The defendant furnished him with an automobile, and paid the expenses of its operation. The agent resided in Des Moines, and frequently sought retail customers to patronize the dealers to whom he made sales. The court, in reaching its decision that the corporation was doing business in Iowa, relied principally upon the *Tauza* and the *International Harvester* cases, *supra*. After quoting from the latter case, the court stated:

"The continuous course of business referred to was the solicitation of orders, which were sent to another state, and

*in response to which the machines of the Harvester Company were delivered within the state of Kentucky.* The court said, "This was a course of business,—not a single transaction." It is true that the above language is followed by a reference to the fact that the agents were authorized to receive notes, drafts, checks, money, etc., and transmit the same to the Harvester Company. Such transactions were, however, merely formal acts, and involved the exercise of no discretion on the part of the agent, and were always referable to transactions closed by the approval of the order, and, no doubt, generally by the delivery of the machines. *These transactions are not given significance in what the court terms a continuous course of business.* (Italics ours.)

[fol. 67] It is apparent that the Iowa court was of the opinion the court in the International Harvester case attached no particular importance to the fact that the agent was authorized to receive notes, checks, drafts, etc. This is evident from the concluding words in the opinion of the Shankland case:

"We recognize that the question is by no means free from difficulty, but it seems to us that the facts disclosed by the record establish that petitioner was, and has been for many years, engaged in *a systematic and continuous course of business in the solicitation of orders* and the delivery and shipment of merchandise to numerous customers, new and long established, and that such conduct constitutes doing business in this state within the meaning of that term as used in section 11072 and as construed and interpreted by the decisions of the supreme court of the United States. If the corporation was doing business in this state, it will hardly be questioned that Killingsworth [the agent] was a proper person upon whom service might be had." (Italics ours:)

The case of West Publishing Co. v. Superior Court, 20 Cal. (2d) 720, 128 P. (2d) 777, is, in our opinion, a well considered case. Many cases are cited, among them Green v. Chicago, B. & Q. Co., *supra*, and People's Tobacco Co. v. American Tobacco Co., *supra*, often cited to sustain the contention that a foreign corporation is not doing business in the state where service of process was attempted to be



made. It also cites, and to a great extent relies on, the *Tauza* and *International Harvester* cases; *supra*, and recognizes that the adjudicated cases since the *International Harvester* decision have not been in complete agreement as to the precise factors additional to *mere solicitation* which motivated the court in the *Harvester* case to sustain the jurisdiction of the Kentucky court. The case goes on to say that while the decision in *People's Tobacco Co. v. American Tobacco Co.*, *supra*, seems to have stressed the fact that the agents in the *Harvester* case were authorized to receive payments in Kentucky, other leading authorities have viewed the *quantity* and *continuity* of the solicitation of business in Kentucky as the controlling factor of the decision, rather than the mere additional circumstances of collecting money, citing, as sustaining this latter theory, *Tauza v. Susquehanna Coal Co.*, *supra*, and *American Asphalt Roof Corp. v. Shankland*, *supra*.

[fol. 68] A good discussion of the question here presented will be found in *Dahl v. Collette*, 202 Minn. 544; 279 N. W. 561, where practically all the leading cases decided up to that time (April 1938) are cited and discussed. We quote from the cited case:

"Courts are agreed that solicitation, if the only evidence of the visitation of a foreign corporation, will not warrant finding that the corporation is doing business so as to be subject to process. [Citing among other authority *Green v. C. B. & O. Ry.*, *supra*.] This is not to say that solicitation, regularly and systematically conducted, within the jurisdiction is without import in deciding whether the corporation is doing business therein. Its simple meaning is that solicitation alone without other corroborating circumstances is not of sufficient strength to sustain the inference that the corporation is present. Solicitation aided by further manifestations of corporate presence no one of which is singly capable of carrying the weight of the inference will warrant the conclusion that it is doing business here.

"Solicitation in regular course of business, together with acceptance and performance of the contract within the state, will give ample ground for the conclusion of corporate presence. Or if the solicitation results in a continuous flow of goods into the state and if payment therefor is made within the state, these factors altogether

support the inference that the corporation is present doing business . . . .

*It has also been held that if regular and systematic solicitation concurs with a continuous flow of goods into the state the inference is permissible . . . .*

Solicitation joined with adjustment of complaints as a part of the ordinary course of business also sustains the inference . . . .

The substance of the cases seems to be that although the rule against the sufficiency of solicitation alone still persists, 'it readily yields to slight additions.' (Italics ours.)

The court then states that the facts show that

"There was a solicitation of orders, which although not incessant in the sense that it was being conducted here at all times, yet was regular and systematic rather than incidental and haphazard. The volume of its products coming into the state as the direct result of this solicitation, while perhaps inconsiderable in relation to the total of its national business, was nevertheless substantial. The flow of its manufactures into the state appears to have been constant and continuous. The compromise and adjustment of disputes with its customers appears also to have been habitually carried on here. Added to these circumstances is the fact of the maintenance of display and demonstration rooms at conventions attended by present and prospective customers under the management of an officer or agent of appellant. This occurrence is not of great weight, neither is it quite without significance . . . .

"While it may be admitted that no one of the factors relied upon by respondents to demonstrate the corporate presence within the state of appellant is capable of sustaining that inference, and while the courts in some instances, as has been pointed out, are divided as to the sufficiency of any two of them, we are confident that their cumulative strength is ample to support the conclusion we reach that appellant was doing business and was therefore present within this state at the time service of the summonses and complaints was made on Collette as its agent."

[fol. 69] The Wisconsin court in *In re* *Petition of Northfield Iron Co.*, 226 Wis. 487, 277 N. W. 168, places the same interpretation upon the *International Harvester* case as did

the Iowa court in the Shankland case and the New York court in the Tauza case, saying:

"It is our conclusion that so far as the question of state power is concerned, the International Harvester Co. case, *supra*, must be taken to make valid a statute by a state providing for service upon the soliciting agent of a foreign corporation whose only activity aside from a solicitation of orders within the state is the filling of these orders through the instrumentality of interstate commerce."

In the case of *Harbich v. Hamilton-Brown Shoe Co.*, 1 F. Supp. 63, the Federal district court for the southern district of Texas had before it a set of facts very much like those in the instant case. In the cited case service was made upon one Dan Smith, a salesman for the shoe company in the state of Texas. So far as the opinion indicates, Dan Smith had authority only to solicit orders, which he did in a regular and systematic way, by appearing at customer's stores and offering samples for the customer's inspection. Smith had no authority on behalf of the shoe company to sell merchandise, or otherwise bind the shoe company, but was solely a *soliciting agent*. The orders were taken subject to acceptance by the shoe company at its home office in St. Louis, Missouri. When the orders were accepted, the goods were shipped from outside the state of Texas in interstate commerce. The court held the shoe company was doing business in Texas, and that service on Smith was sufficient service on the company.

A very recent Federal case dealing with this question is *Frene v. Louisville Cement Co.* (U. S. Court of Appeals for D. C.), 134 F. (2d) 511, decided January 25, 1943. In the cited case, the defendant Cement Co. was a Kentucky corporation, having its principal place of business at Louisville, Kentucky. It maintained no office or place of business in the District of Columbia. Its business was the manufacture and sale of cement and cement products. [fol. 70] Lovewell, the agent upon whom service was had, resided in a suburb of Washington. His telephone number, which was displayed together with his home address, his name and that of defendant, upon his business card, was listed in the Washington directory. Lovewell had authority to solicit orders for defendant's products and his territory comprised all of Maryland, except the two west-

ern counties, the District of Columbia, and the eastern part of Virginia. He spent two-thirds or three-fourths of his time in Washington, which he said was "the biggest market in my territory." The volume of business done in Washington was large. Lovewell had no authority to conclude contracts or make binding sales. When he received orders he forwarded them to the home office in Louisville, where they were accepted or rejected. Shipments on orders accepted were made in interstate commerce to building supply dealers in the vicinity of the job, who in turn supplied them to the contractors. Lovewell frequently visited jobs in course of construction, where defendant's products were being used, and on these occasions he would note the manner in which the products were being installed or used, and if any difficulties were being experienced, he would make suggestions as to how to overcome them. He would also go over any complaints and report them to the home office, but he had no authority to finally make adjustments or compromises. We quote from the opinion, which was written by Justice Rutledge, and which we think contains a sound criticism of the solicitation rule:

"The tradition has grown that personal jurisdiction of a foreign corporation cannot be acquired when the only basis is 'mere solicitation' of business within the borders of the forum's sovereignty. And this is true, whether the solicitation is only casual or occasional or is regular, continuous and long continued.

"The tradition crystallized when it was thought that nothing less than concluding contracts could constitute 'doing business' by foreign corporations, an idea now well exploded. It is now recognized that maintaining many kinds of regular business activity constitutes 'doing business' in the jurisdictional sense, notwithstanding they do not involve concluding contracts. In other words, *the fundamental principle underlying the 'doing business' concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting.*

[fol. 71] "Furthermore, since the tradition crystallized, other developments in the law of personal jurisdiction have cast doubt upon its validity. These in general have expanded the scope of jurisdictional power over the persons of nonresidents, including foreign corporations. It is still true, generally speaking, that mere casual and occasional

acts do not furnish a sufficient basis for assertion of jurisdiction of the person in cases of nonresidents. But the non-resident motorists' statutes, which are applicable to foreign corporations, and the fact they have been so widely enacted and sustained, show two things among others. The first, like the cases sustaining jurisdiction upon a basis of 'solicitation plus,' is that contracting, casually or continuously, is not essential for jurisdictional purposes, nor is negotiation, solicitation, or other activity looking toward the formation of contracts. The second is that some casual or even single acts done within the borders of the sovereignty may confer power to acquire jurisdiction of the person, provided there is also reasonable provision for giving notice of the suit in accordance with minimal due process requirements. \* \* \* In general the trend has been toward a wider assertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up. \* \* \*

"But when jurisdiction has been extended to include some types or kinds of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in 'mere solicitation' is, to say the least, anomalous. \* \* \*

*Solicitation is the foundation of sales.* Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not 'doing business.' *The merchant or manufacturer considers these things the heart of business.* It is perfectly possible, under the 'mere solicitation' rule, for a foreign corporation to confine its entire market to a single jurisdiction, yet by carefully limiting its activities there to the soliciting phase, to force each of its customers having cause for legal redress to seek it in the foreign forum of incorporation. By careful segregation of the 'selling' phase in the place of market, a substantially complete immunity to liability, in the practical sense, could be created.

"It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a *regular, continuous and sustained course of business*, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. Although the rule has not been clearly and expressly repudiated by the Supreme Court, its integ-



rity has been much impaired by the decisions which sustain jurisdictions when *very little more* than 'mere solicitation' is done." (Italics ours.)

While it is apparent that the court was of the opinion that the mere solicitation rule should be abandoned when the soliciting activity is a *regular, continuous and sustained course of business*, the court did not deem it necessary "to take the final step in repudiation in this case, since the facts are sufficient to bring it within the 'solicitation plus' rule."

Justice Edgerton, in a concurring opinion in the cited case, stated:

[fol. 72] "It has been suggested that 'the existence of jurisdiction to determine the personal liability of a corporation . . . depends on the reasonableness of its exercise' and that 'if a foreign corporation voluntarily does business within the state it is bound by reasonable regulations of that business imposed by the state . . . because it is as reasonable and just to subject the corporation to these regulations as though it had consented.' In the normal course of business appellee's agent induced appellants, in the District, to buy its product. They bought it in the District, for use in the District, from a District dealer to whom appellee had sold it. They used it in the District. The alleged defect appeared there and the alleged cause of action presumably arose there. Appellants appear to reside there. I think it is reasonable and just that they should be allowed to enforce their claim there."

We find a statement by this court in the case of *Macario v. Alaska Gastineau Mining Co.*, 96 Wash. 458, 165 Pac. 73, quite in accord with the view expressed by Justice Edgerton:

"We think an examination of the authorities will show that the place of the arising of the cause of action has been generally regarded as of controlling force by the courts in determining the question of a defendant foreign corporation being subject to the process of the court wherein recovery is sought, wherever the question of such foreign corporation doing business generally in the state in which it is sought to be sued is one of doubt."

In the case of *Grams v. Idaho National Harvester Co.*, 105 Wash. 602, 178 Pac. 815, the court held that the defendant, an Idaho corporation, was doing business in this state,

and was amenable to process of the courts of this state. In addition to selling combined harvesting machines in this state, the company kept on hand, in a warehouse in this state, a large quantity of repair parts for the machines. Many of these articles were sold by the warehouse company as the property of the Harvester Co., the former accounting to the latter for all sales made.

In the case of *State ex rel. Kerr Glass Mfg. Co. v. Superior Court*, 166 Wash. 41, 6 P. (2d) 368, we held that the solicitation of orders in this state by one Huch, a resident of this state, coupled with the fact that the Glass Co., a Nevada corporation, kept some of its goods in storage in this state, constituted doing business. Huch had no authority to accept orders, but all of the orders were taken subject to approval by the Glass Co. at its home office in Oklahoma. The Glass [fol. 73] Co. completed delivery when the products were turned over to the transportation company in Oklahoma. Bills of lading, invoices and statements were sent from the Glass Co. direct to the buyer. Remittances were made direct from buyer to seller. Huch made no collections, and had nothing to do with extending credit.

Summing up the facts in the instant case, we find that the salesmen are all residents of the state of Washington, and have definitely defined territory assigned to them. There is no storage or warehousing of goods. The activities of these agents of appellant consist of the solicitation of orders and the display of samples, sometimes in permanent display rooms. Salesmen are required to spend certain time each year in St. Louis for the purpose of receiving direct personal instructions as to their duty, as to the line of shoes which they are to offer to the trade, the method of selling, and information with reference to the construction of new types and kinds of shoes which are to be offered to the trade. Some of the salesmen rent sample rooms in business buildings, and the expense of such rental and maintenance is paid by the salesmen, who are reimbursed on an expense account by appellant. There is a detailed program followed by the company through contact with the salesmen, to keep the company's business at a high level; to eliminate differences arising in the particular territory, and to discuss credit of Washington purchasers and customers with whom the company is doing business. As a result of the activities of these agents, there is a continuous flow of appellant's product into this state by means of interstate

carriers. This course of action has been carried on over a period of years, by as many as thirteen salesmen, and the substantial volume of merchandise and the regularity of its shipment are clearly shown by the amount of commissions regularly earned by these resident salesmen.

In the case of Bankers Holding Corporation v. Maybury, 161 Wash. 681, 297 Pac. 740, this court adopted the following definition of business, as stated in Flint v. Stone Tracy Co., 220 U. S. 107:

“ ‘Business’ is a very comprehensive term, and embraces everything about which a person can be employed \* \* \* ‘That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.’ ”

It seems to us, after a consideration of the facts in this case and the authorities bearing on the question here presented, that the conclusion that appellant, through its agents, was doing business in this state so as to make it amenable to process, is inescapable, whether we follow the “corporate presence theory” or base our decision on the reasonableness of permitting the corporation to be sued in this state rather than forcing respondent to go to Missouri or Delaware to bring its action.

While we are of the opinion that the regular and systematic solicitation of orders in this state by appellant’s agents, resulting in a continuous flow of appellant’s product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process of the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule.

On this question, appellant cites and relies on State ex rel. Paraffine Companies v. Wright, 184 Wash. 69, 49 P. (2d) 929, and Bank of America v. Whitney Bank, 261 U. S. 171. In the former case, the cause came before this court on an application for a writ of mandate to compel the Thurston county superior court to transfer the cause to King county. The application of the Paraffine Co. was based upon the claim that it transacted no business in Thurston county, had no office there, and that there was no person residing in Thurston county upon whom process against it could be served. It appears that there was no person or company in Thurston county having the relationship of

agent to the Paraffine Co. All purchases made by Olympia customers of the company were made at the Seattle office, [fol. 75] where the principal place of business of the company was located. The customers of the Paraffine Co. in Olympia handling its products did so as independent merchants, and not as agents. The case is not in point.

The factual situation in the second case above cited is so different from that in the instant case that it cannot be considered helpful herein.

The second assignment of error in the case at bar is that Mr. Alley, upon whom service was made, was not such an agent as is contemplated by Rem. Rev. Stat., § 226. In view of the conclusion reached by us on the first question presented, we are of the opinion this question can be briefly disposed of.

The entire business of appellant in the state of Washington was carried on by Mr. Alley and other agents having like authority. Subsection 9 of § 226 states that if the suit be against a foreign corporation doing business within this state, service may be made on "any agent."

We stated in *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161, that

"The words of the statute 'any agent' were intended to have a broad meaning, and must be liberally construed to effectuate the legislative intent. While they may not include a day laborer or an employee who has no authority to represent the corporation in any way other than to discharge his daily task, they must be held to include all such agents as represent the corporation in either a *general* or a *limited* capacity." (Italics ours)

See, also, *Pacific Typesetting Co. v. International Typographical Union*, 125 Wash. 273, 216 Pac. 358.

It is interesting to note, in view of what we have said on the first question and in the consideration of the second, that in the last cited case we quoted with approval the following statement found in *Beach v. Kerr Turbine Co.*, 243 Fed. 706:

"The tendency of legislation and of judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations. As was said by Mr. Justice Gray in *Barrow Steamship Co. v. Kane*, 170 U. S. 100, [fol. 76] 'The constant tendency of judicial decisions in

modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them." "

On this question we desire to again call attention to the following statement found in the case of *Tauza v. Susquehanna Coal Co.*, *supra*:

"It is not necessary to show that express authority to accept service was given to the defendant's agent. His appointment to act as agent within the state carried with it implied authority to exercise the powers which under our laws attach to his position . . . . When a foreign corporation comes into this state, the legislature, by virtue of its control over the law of remedies, may define the agents of the corporation on whom process may be served . . . . If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit . . . . The corporation is here; it is here in the person of an agent of its own selection; and service upon him is service upon his principal."

We do not deem further citation of authority necessary. We are of the opinion appellant's second assignment is without merit.

The remaining question is whether or not the imposition upon appellant of liability for contributions to the Washington unemployment compensation fund is an unconstitutional burden upon interstate commerce.

We stated in *Bates v. McLeod*, 11 Wn. (2d) 648, 120 P. (2d) 472, that the contributions exacted under the unemployment compensation act constituted an excise tax upon the privilege of employing others. Employment is defined by Rem. Rev. Stat. (Sup.), § 9998-119 (g) (1), as follows:

"'Employment,' subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

It would seem that the act clearly contemplates that contributions shall be paid into the unemployment compensation fund for such employment as we have in this case. Assuming that appellant is engaged in interstate commerce,



by reason of the fact that its agents take orders in this state for goods to be shipped from another state, yet we are of [fol. 77] the opinion that the contributions exacted by the unemployment compensation act from appellant do not constitute an unlawful burden on interstate commerce. Probably to meet such an argument as is made by appellant herein, and to permit the unemployment compensation acts of the several states to cover the largest possible range of employees, Congress passed the following statute:

"No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." 26 U. S. C., § 1616 (a).

Appellant contends that it is not required, under the state law, to make payments to the unemployment fund. We see no merit in this contention, as the act defines employing unit as follows:

"Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign \* \* \* which has or subsequent to January 1, 1937, had in its employ eight or more individuals performing services for it within this state." Rem. Rev. Stat. (Sup.), § 9998-119 (e).

An employer is defined by the act as

"Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year \* \* \* has or had in employment eight or more individuals \* \* \* Rem. Rev. Stat. (Sup.) § 9998-119 (f) (1).

Appellant is a foreign corporation having in its employ for several years more than eight individuals in each of twenty different weeks, performing services for it within this state, and so, under the plain terms of the act, is required to make contributions to the unemployment compensation fund.

We are of the opinion Congress meant just what it said in the above quoted statute, and that appellant's objection to payment of contributions on this ground is not tenable. But even without the act of Congress above set out, we do not think appellant could avoid liability upon this ground. The cases cited by appellant are cases dealing with taxes imposed on doing business, and the imposition of such taxes on corporations doing business in interstate commerce [fol. 78] would clearly tend to burden that commerce.

This court pointed out the distinction between such cases (tax on engaging or continuing within this state in any business) and the instant case, in *Paramount Pictures Distributing Co. v. Henneford*, 184 Wash. 376, 51 P. (2d) 385, where the court stated:

"It being an excise tax for the purpose of raising revenue, the act of the legislature imposing it was not passed in the exercise of the police power. Whether a law is enacted in the exercise of that power, depends upon whether the primary purpose is to raise revenue or to regulate industry."

In the instant case, the act under consideration was passed in the exercise of the police power, for the purpose of relieving distress in this state resulting from involuntary unemployment.

In the case of *United Fruit Co. v. Department of Labor & Industry*, 344 Pa. 172, 25 A. (2d) 171, the Pennsylvania court held that the fruit company, engaged wholly in foreign commerce, with its principal office in Boston, but employing about three hundred persons within the state of Pennsylvania, was subject to the workmen's compensation act of Pennsylvania, although it required no authority from that state to carry on its business. The court then stated:

"The fact that an employe working within the state of Pennsylvania is engaged in interstate or foreign commerce does not necessarily take him outside the range of the workmen's compensation act, which applies . . . to all accidents occurring within this commonwealth." It is well settled that, in the absence of federal legislation on the subject, a state may, without violating the commerce clause of the federal constitution, legislate concerning relative rights and duties of employers and employes while within its borders, although engaged in interstate commerce."

This view was sanctioned by the United States supreme court in *Valley Steamship Co. v. Wattawa*, 244 U. S. 202. In the cited case the steamship company was engaged in interstate commerce, and contended that it was not liable under the Ohio workmen's compensation act. Answering this contention, Mr. Justice McReynolds, speaking for the court, said:

[fol. 79] "We are asked to reverse the action of the Court of Appeals upon two grounds. First, because the company was engaged in interstate commerce and therefore could not be subjected to the compensation act without burdening such commerce contrary to the commerce clause of the Federal Constitution."

"The first point relied upon is entirely without merit and inadequate to support our jurisdiction. In the absence of congressional legislation the settled general rule is that without violating the commerce clause the states may legislate concerning relative rights and duties of employers and employees while within their borders although engaged in interstate commerce."

In conclusion, we are of the opinion the unemployment compensation act does not impose a burden upon interstate commerce, in so far as the business of appellant is concerned.

The judgment of the trial court is affirmed.

Jeffers, J.

We concur: Beals, J., Steinert, J., Blake, J., Robinson, J., Mallery, J., Grady, J.

[fol. 80]

#### DISSENTING OPINION

SIMPSON, C. J. (dissenting):

"As a member of this court, I feel impelled by a strong sense of duty to dissent from the able opinion prepared by the majority. I write this dissent prior to completion of its circulation among my fellow judges. I write it with a sincere hope that I may change the views of the writer and convince all of the judges that the majority opinion as now written is incorrect.

This case comes to us upon an agreed statement of facts which reads:

"International Shoe Company is a Delaware Corporation. It has its principal place of business in the City of St. Louis,

Missouri. Its principal business consists of manufacture and sale of boots, shoes and other footwear. It maintains places of business where manufacturing is carried on and from which its merchandise is sold in the states of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York and New Hampshire. Its merchandise is sold through its several selling divisions or branches, the following branches being the only ones doing any sort of business with residents of the State of Washington:

“Roberts, Johnson & Rand.

Peters

Friedmann—Shelby

Specialty

“It has not a place of business in the State of Washington; maintains no general agent in the State of Washington. It makes no contracts, either of sale or of purchase in the State of Washington. It maintains no stock of merchandise in the State of Washington and makes no deliveries of merchandise in intra state commerce in the State of Washington. \* \* \*

“The manner in which the business of International Shoe Company is carried on in the State of Washington, is generally as follows:

“Salesmen are employed from the head office at St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are required as part of their duties to spend certain time each year in St. Louis, Missouri for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling, and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen [fol. 81] are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and the expenses of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities to which they travel.

"Such transactions as the International Shoe Company has with persons in business, or who reside in the State of Washington, involving the sale and distribution of its merchandise to merchants in the State of Washington and are conducted as follows:

"Each salesman is given a designated territory in which to solicit orders. The authority of the salesman is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If orders are obtained, to transmit them to the office of the International Shoe Company outside the State of Washington for acceptance or rejection, and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F. O. B., shipping point, from outside of the State of Washington. Practically all merchandise shipped by International Shoe Company into the State of Washington is on orders approved in St. Louis, Missouri and shipped therefrom. The merchandise which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which point collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salesman's duties and authority being limited strictly to the solicitation of orders.

"The salesmen are under the direct control and direction of the International Shoe Company and are not permitted to be engaged in an independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company.

"On October 10, 1941, a copy of Notice of Assessment by the Commissioner of Unemployment Compensation and Placement, was delivered to and left with one, E. S. Alley, a salesman of the International Shoe Company, at Seattle, Washington, demanding payment of delinquent contributions or interest, in the sum of \$6000. Said sum was not arrived at by calculation of the wages earned by salesmen of the International Shoe Company within the State of Washington, but was an arbitrary figure set by the Commissioner. E. S. Alley, is a salesman of the International Shoe Company, employed upon the terms and under the authority and for the purpose as hereinabove referred to for



employees of International Shoe Company within the State [fol. 32] of Washington. A copy of the same notice of assessment was also placed in the United States mails, postage fully prepaid, addressed to International Shoe Company at St. Louis, Missouri, on the 10 day of October, 1941. Thereafter, and on the 18th day of October, 1941, International Shoe Company filed with the Department of Unemployment Compensation and Placement, its special appearance, motion to quash service and objection to jurisdiction."

The principal question is whether appellant is doing an intrastate business or is engaged in interstate commerce.

Involved in this question is the determination of whether the soliciting of business amounted to "doing business" so as to render the foreign corporation amenable to service of process.

The appellant was not properly served within the meaning of Rem. Rev. Stat., § 226, which reads:

"The summons shall be served by delivering a copy thereof, as follows:

"9. If the suit be against a foreign corporation . . . doing business within this state, to any agent, cashier or secretary thereof; . . ."

If at the time E. S. Alley, one of the salesmen mentioned in the stipulated statement of facts, was served with process, the company was doing an interstate business, of course our courts would have no jurisdiction, because the Federal government, under the provisions of subsection 3, of § 8, Art. I of the constitution, has exclusive power

"To regulate commerce with foreign nations and among the several states and with the Indian tribes;"

This court is committed to the rule that corporations doing an interstate business cannot be held liable to our State laws. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505; *Smith & Co. v. Dickinson*, 81 Wash. 465, [fol. 83] 142 Pac. 1133; *Alaska Pacific Navigation Co. v. Southwark Foundry & Machine Co.*, 104 Wash. 346, 176 Pac. 357; *Rawleigh Co. v. Harper*, 173 Wash. 233, 22 P. (2d) 665; *State ex rel. Paraffine Companies v. Wright*, 184 Wash. 69, 49 P. (2d) 929; *Brandtjen & Kluge, Inc. v. Nanson*, 9 Wn. (2d) 362, 115 P. (2d) 731.

The phrase "doing business within this state" has been defined on many occasions. In *Smith & Co. v. Dickinson*, supra, the facts were that a foreign corporation manufactured merchandise in the state of Nebraska and sold some of its products in this state. Its method of selling was that its representatives took orders here for the merchandise and forwarded those orders to the company at Omaha for approval or rejection. If the order was accepted, the goods were shipped from Omaha to the buyer in this state and sold on credit. The salesman had offices in Seattle and Spokane, at which places he retained exhibit samples belonging to the corporation and also made trips throughout the state for the purpose of selling the goods and at times paid the expenses of proposed customers from their homes to Seattle and Spokane. The agent did not have authority to complete sales; neither could he extend credit nor make collections. In addition the record disclosed that the agent resold certain goods to other customers and at one time went so far as to sell some of his samples, the sale being closed through the office at Omaha. This court upheld the trial court's decision that the company was not doing business in the state of Washington.

The majority opinion passes the Dickinson case with the observation that it is not in point because it referred to the [fol. 84] statute relating to the payment of a fee before an action could be instituted in the courts of this state.

We did not take that view of the case in *State ex rel. Paraffine Companies v. Wright*, supra.

Nor did the Federal courts so consider it in the cases of *Johanson v. Alaska Treadwell Gold Mining Co.*, 225 Fed. 270; *Zimmers v. Dodge Brothers*, 21 F. (2d) 152; and *Klabzuba v. Southern Pac. Co.*, 33 F. (2d) 359.

The rule laid down in the foregoing case was approved in the following cases: *Macario v. Alaska Gastineau Mining Co.*, 96 Wash. 458, 165 Pac. 73; *Rawleigh & Co. v. Harper*, supra; *State ex rel. Paraffine Companies v. Wright*, supra; *Brandtgen & Kluge, Inc. v. Nanson*, supra; and *Proctor & Gamble Co. v. King County*, 9 Wn. (2d) 655, 115 P. (2d) 962.

I call the attention of the students of this problem to the extensive citation of cases in 60 A. L. R., pages 1020 to 1030, inclusive. A reading of those cases brings forth the information that the principle announced in *Smith & Co. v. Dick-*

inson, *supra*, is approved by practically all the courts in the Union.

In another line of cases, we have considered the question of whether a corporation is doing business within a certain county. This proposition has arisen in those cases in which a corporation was sued and it contended that the court did not have jurisdiction within the provisions of Rem. Rev. Stat., § 205-1, which reads:

"An action may be brought in any county in which the defendant resides, or, if there be more than one defendant, where some one of the defendants resides at the time of the [fol. 85] commencement of the action. For the purpose of this act, the residence of a corporation defendant shall be deemed to be in any county where the corporation transacts business or has an office for the transaction of business or transacted business at the time the cause of action arose or where any person resides upon whom process may be served upon the corporation, unless hereinafter otherwise provided."

In the following cases, this court has held that a corporation was not doing business in a county unless it transacted therein a part of its usual and ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions: *State ex rel. Wells Lumber Co. v. Superior Court*, 113 Wash. 77, 193 Pac. 229; *State ex rel. American Savings Bank & Trust Co. v. Superior Court*, 116 Wash. 122, 198 Pac. 744; *Alto v. Hartwood Lumber Co.*, 135 Wash. 368, 237 Pac. 987; *State ex rel. Seattle National Bank v. Joiner*, 138 Wash. 212, 244 Pac. 551; *State ex rel. Yakima Trust Co. v. Mills*, 140 Wash. 357, 249 Pac. 8; *State ex rel. Harrington v. Vincent*, 144 Wash. 246, 257 Pac. 849; *State ex rel. Kerr Glass Manufacturing Co. v. Superior Court*, 166 Wash. 41, 6 P. (2d) 368; *State ex rel. Hoffman v. Superior Court*, 168 Wash. 472, 12 P. (2d) 607; *State ex rel. Paraffine Companies v. Wright*, *supra*.

I call especial attention to the last state case cited, and shall discuss the Federal case later. In that case, the question presented was whether or not the Paraffine Companies was transacting business in Thurston county at the time its principal place of business was in King county. The facts were that the company sent salesmen throughout the state to call upon prospective purchasers and to obtain orders

which were transmitted to Seattle. In case the orders [fol. 86] were approved by the credit department, the sales were made in the home office. No authority to bind the company to sales was given to the salesmen, and all orders were subject to approval. Deliveries were made either from the Seattle warehouse or the factory in California. The products were sold to three merchants of Olympia, two of whom were retail dealers. One of them, the Washington Veneer Company, was supplying other dealers. The salesmen accompanied representatives of the veneer company to various dealers in Thurston county. The dealers were told that the products of the Paraffine Companies would be handled by the local company, which would supply the dealers. The transactions were made in accordance with those statements. It appears that the veneer company ordered goods through the salesmen and made payments approximately every thirty days. This court held that the Paraffine Companies was not transacting business in Thurston county, and, in so doing, stated:

"While the veneer company is referred to as a distributor, it purchases from the Paraffine Companies at a discount, in the course of trade, and resells to its own customers at a profit. The other two concerns purchase, in ordinary course, the products that are needed to supply their immediate customers. While the Paraffine Companies' salesmen stimulate trade and solicit the use of its products, purchases are made by the Olympia dealers at the Seattle office.

"We are clear that the Paraffine Companies is not transacting business within Thurston county, as the term has been defined by this court."

The decision was bottomed upon the Dickinson case, from which a liberal quotation was made.

I now call attention to a third series of cases in this state, some of which are not mentioned by the majority, which are [fol. 87] directly in point and decisive of the question presented in this case.

In *Rich v. Chicago, B. & Q. R. Co.*, 34 Wash. 14, 74 Pac. 1008, this court held that a railway company was not doing business in this state when it had an agent here who solicited passenger and freight traffic. In that case, we held that the trial court's judgment quashing service upon the agent who solicited the business was correct.

In *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650, it was held that a railway company was not doing business in this state when it maintained an office in Seattle from which advertising matter of the company was distributed and freight and passenger business was solicited. It is true that the agent was paid by other companies, but it is equally true that tickets were sold which frequently were for passage over the defendant railroad company's lines.

In *Royce v. Chicago & Northwestern R. Co.*, 90 Wash. 378, 156 Pac. 16, this court approved the action of the trial court in quashing service against a railroad company. Service was made against one who was advertised as the "general agent" of the defendant. The decision was based entirely upon *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, supra. In passing, the court stated:

"Considering the multitude of corporations and that, unlike individuals, they can be served through agents, all courts have shrunk from a rule which would soon swamp home tribunals with foreign brawls. Nor have we any desire, through the same rule, to expose our own incorporated merchants and carriers on like service to suits in every other state. Undoubtedly the universal opinion that solicitors for nonresident railroads and commercial houses [fol. 88] are not agents for local service arises from these two apprehensions, and it was also foreseen to be unfair, as well as injurious to interstate commerce, to subject such principals to suits in our more than forty states, while the plaintiffs in most cases would be exposed to suit only at home."

In *Macario v. Alaska Gastineau Mining Co.*, supra, this court determined that a mining company was not doing business in this state to an extent to give our courts jurisdiction over it. Its only business was to maintain an office in Seattle and an agent who was named "supply and forwarding agent" and whose duty it was to forward supplies to the company in Alaska. The agent also made hotel and transportation reservations for officers and employees of the company who passed through Seattle on their way to Alaska. That agent had authority to make contracts of purchase when any considerable quantities had to be approved by his home office.



In *Alaska Pac. Nav. Co. v. Southwark Foundry & Machine Co.*, supra, it was held that a person was not an agent who was merely employed as a mechanical engineer of a foreign corporation for the purpose of installing a piece of machinery.

In *Watson v. Oregon Moline Plow Co.*, 113 Wash. 110, 193 Pac. 222, we held that a foreign corporation was not doing business in the state through an agent where the person who it was claimed was an agent was merely buying machinery from the foreign corporation and selling it here on his own account.

As I have mentioned, the Federal courts have passed upon this question.

In *Johanson v. Alaska Treadwell Gold Mining Co.*, supra, an attempt was made to sue a gold mining company in the Federal court of this state. The defendant was a Minnesota corporation and had not complied with the laws of Washington authorizing it to do business here. It had [fol. 89] general offices in Alaska and in San Francisco. It appeared further that its agent had purchased goods, wares and merchandise in Seattle with direction that the same be shipped to the company at Treadwell, Alaska; that all such purchases were subject to the approval of the company; that the duties of the agent were to see that the goods were transported or forwarded from Seattle to Treadwell, Alaska; and that the agent did not pay for any goods or disburse any money. A motion was made to quash the service of summons made upon the agent in Seattle. The Federal court granted the motion and quashed the service, and, in so doing, based its decision upon, and quoted from, the *Dickinson* case, supra.

In *Zimmer's v. Dodge Brothers*, supra, the Federal court in Illinois had before it the question of what was doing business in the state of Illinois. Referring to the facts in the case, the court set them out as follows:

"It is organized for, and does the business of, manufacturing, selling, and dealing in automobiles and automobile parts and accessories. Its principal office is Baltimore, Md. Its factories and principal place of business are located at Hamtramck, Mich., near Detroit, and that is the distributing center for the company's products. It does not have sales agents throughout the country, but sells to independent dealers, who in turn sell to associate dealers or other

dealers, or directly to the ultimate purchasers or users. The relation between the company and the dealers is that of vendor and vendee. Dealers are appointed under a written 'dealer's agreement,' which becomes effective only upon execution by the company at Hamtramck after execution by the dealer. Dodge Brothers, Inc., grants to the dealer the right to purchase Dodge Brothers motor vehicles and parts for resale in a designated territory, but the manufacturer is not bound to deliver any specified quantity. The manufacturer delivers the motor vehicles and parts to the dealer, by delivering them to a common carrier at Hamtramck, Mich., and thereafter the dealer assumes all the risk of loss and damage. The dealer pays for the motor vehicles and parts purchased, either in cash at the defendant's factory or on presentation of sight draft against bill of lading. Each dealer, at his own expense, maintains salesrooms for the purposes of exhibiting and selling the motor vehicles and parts.

"The defendant has in its employ 25 district representatives, located in 25 of the principal cities of the United [fol. 90] States. One of the district representatives is located in Chicago and has an office here. His duties are to look after the interests of the defendant in the Chicago district and to make reports to the defendant from time to time; to investigate and interview men available as dealers and submit recommendations to the officials of the defendant corporation for final approval; to observe if subdealers get an adequate supply of cars from dealers; to assist in settling disputes between dealers; to help the dealers with their sales and service problems; to stimulate sales contests among dealers; to advise the dealers in regard to their used car problems; to inform the dealers about methods of organizing; to talk to salesmen about problems of salesmanship; and to keep the defendant fully informed of conditions prevalent and events happening with respect to the industry in his district.

"He takes no active part in the sale of motor vehicles or parts; he has no authority to make contracts on behalf of the defendant corporation, nor has he done so; he maintains his office and makes all contracts, relating to the upkeep of his office, on his own behalf, and is reimbursed for his expenditures weekly by checks from Detroit, Mich.; his salary check is sent to him bimonthly from Detroit, Mich.; he takes the lease for office space in his own name; he keeps

his bank account in his own name, without reference to his position as district representative; and his letter-heads do not represent him to be an agent of Dodge Brothers, Inc.

"The district representative has no authority to commit the defendant finally in any way. He has a secretary, whose salary is paid by the company's check from Hamtramck. Persons inquiring at the office in Chicago with reference to service or purchase or exchange of Dodge Brothers automobiles are referred to the Dodge dealer in Chicago. This secretary compiles information from dealers and transmits such information to the company at Hamtramck."

The court held in that case that the facts did not show that the defendant corporation was doing business in the state of Illinois, and quashed the service of summons. In passing upon the question involved, the court cited *Rich v. Chicago, B. & Q. R. Co.*, supra, as sustaining authority.

*Klabzuba v. Southern Pac. Co.*, supra, is another case decided in the Federal court for western Washington. In that case, an action was commenced against a Kentucky corporation which was doing some business in this state, but had [fol 91] not complied with our laws relative to foreign corporations doing business here. The facts show that defendant was an interstate carrier by a railroad, but did not own any railroad in the state of Washington, nor did it receive, carry or deliver passengers or freight in this state. Service was made upon an employee of the company whose duty it was to solicit for passenger and freight traffic. The defendant maintained an office in the city of Seattle in charge of a representative who made the solicitations for passenger and freight traffic. It further appears that, when application was made, through tickets were issued from Seattle to outside points on the defendant's line by three railroad companies; that, to expedite the service, blocks of tickets were carried in stock by representatives of defendant and bore the name of one of the initial carriers, but not that of the company sued. Relative to the tickets, the facts show that they constituted a contract between the initial carrier and the passenger, the price being collected by the Southern Pacific; that thereafter an adjustment was made between that railroad company and the initial carrier; and that the defendant ultimately received from the initial carrier its share of the total purchase price.

The court referred to *Johanson v. Alaska Treadwell Gold Mining Co.*, supra, and held that the actions of the defendant company did not constitute doing business in the state within the purview of the law giving the court jurisdiction; and, in so doing, cited as its authority *Rich v. Chicago, B. & Q. R. Co.*, supra; *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, supra; *Royce v. Chicago & N. W. Ry. Co.*, supra; and *Macario v. Alaska Gastineau Min. Co.*, supra.

[fol. 92] The first series of cases just discussed lays down a definite uniform rule which defines doing business within this state. The second series follows the reasoning of the first and announces a rule as to what constitutes doing business in a county.

The third series of cases announces the rule relative to what amounts to doing business in this state in order to subject a corporation to actions in the state. A study of these cases brings forth the information that one precise definition of the phrase has been applied and used by this and other courts in determining whether a corporation is doing business within the meaning of Rem. Rev. Stat., § 226(9); Rem. Rev. Stat., § 205-1; or Rem. Rev. Stat. (Supp.), § 3836-2.

We should adhere to established rules and principles so long as they do not indicate a palpable mistake or violate justice, reason and law. If we do find that some of our decisions violate the principles just mentioned, we should overrule those decisions and announce a new and proper rule.

[fol. 93] In this state, we have one definition for negligence, one for contributory negligence, one for reasonable doubt, and one for proximate cause, including many other words and clauses, some used by lawyers and judges, and up until the present time, we have had one definition of what constitutes doing business in the state of Washington. We fail to see any reason for changing our rule and providing for two definitions of what is doing business within this state. The only purpose I can see is to give to the unemployment compensation commission a right not accorded to ordinary litigants.

I repeat, if the majority opinion prevails, we will have in this state two definite definitions of doing business which will confuse judges, lawyers and laymen alike.

To show the baffling condition of our cases which will arise if the majority opinion prevails, I submit the following reasonable assumed situation:

Two actions are commenced upon the same day and filed in the superior court for Thurston county, one of them by John Doe Company against Smith & Company. The second is the State of Washington against the John Doe Company. In the first complaint, the plaintiff alleges that, between the first day of June, 1943, and the 10th day of August, 1944, plaintiff sold and delivered to the defendant goods, wares and merchandise of the agreed value of \$1,000, which defendant refused to pay, though demand has been [fol. 94] made therefor; that the plaintiff is a foreign corporation, has not filed its articles of incorporation with the secretary of state of the state of Washington, nor has it paid its annual license fee to the state of Washington; that its business within this state is interstate business conducted in the following manner: Plaintiff is an Illinois corporation having its business in the city of Chicago, where it manufactures washing machines and sells the same in various states of the Union, including the state of Washington. In the state of Washington its merchandise is sold through several selling divisions or branches in Spokane, Seattle and Olympia. It maintains no general agent in the state of Washington and makes no contracts of sale in the state. It does not maintain a stock of merchandise in this state and makes no delivery of merchandise herein. That the manner in which the business is conducted in the state of Washington is generally as follows: Salesmen are employed from the Chicago office and work under the direct supervision and control of the sales managers in Chicago and are required as part of their duties to spend a certain portion of their time in Chicago for the purpose of receiving direct personal instructions as to their duties relative to the line of machines sold to the trade and the method of selling; further to receive information with reference to construction and new types and kinds of washing machines which are to be offered. The employees or salesmen are given a sample machine, but no sales are made of such samples, they being used for purposes of display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and expenses of the rental and maintenance are paid by them and they are then reim-



bursed on expense account by plaintiff. Some salesmen [fol. 95] maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the cities through which they travel. Each salesman is given a designated territory in which to solicit orders. The authority of each salesman is limited to exhibiting samples of the machines for which they solicit orders for the merchandise. Salesmen endeavor to procure orders on prices and terms fixed by plaintiffs. If orders are obtained, they are transmitted to the office of plaintiff in Chicago, Illinois, for acceptance or rejection, and if orders are accepted by the plaintiff, the merchandise is shipped f. o. b. from shipping points in the state of Washington. The merchandise which is shipped into Washington is invoiced at the point of shipment and the invoices are payable at point of shipment, from which point collections are made. The salesmen have no power or authority to bind plaintiff to any contract or to finally conclude any transaction in its behalf, their duties and authority being limited strictly to the solicitation of orders. It is further alleged that the salesmen are under the direct control and direction of plaintiff and are not permitted to engage in any independently established trade, occupation, profession or business of the same nature involved in their employment by plaintiff.

The second complaint was filed by the state of Washington, seeking to collect taxes for unemployment compensation insurance from plaintiff. John Doe Company's salesman in Seattle or Olympia is served with complaint and summons and the company then moves to quash the service on the ground that it is not doing business in this state, and bases its motion upon the allegations of the complaint which are identical with the allegations contained in plaintiff's complaint against Smith & Company except as to [fol. 96] designation of individuals. Counsel, with the consent of the trial court, agree to argue the cases at the same time.

The trial court is faced with the answer to one question: What amounts to doing business in this state? The trial court then, in rendering its decision upon identical facts, must hold in the first case that plaintiff is not doing business in this state and in the second case that the same individual is doing business in the state.

There are hundreds of cases written on the subject we

have before us. However, it would serve no useful purpose to cite them in this opinion.

I shall content myself by calling attention to the cases cited by the majority. In so doing, I will pay particular attention to the factual situations as compared with those in this case. I shall do this for the reason that each case must necessarily depend on its own facts. *St. Louis Southwestern Ry. Co. of Texas v. Alexander*, 227 U. S. 218, 57 L. Ed. 486.

In *Green v. Chicago, Burlington & Quincy Ry. Co.* (1907), 205 U. S. 530, 51 L. Ed. 916, plaintiff brought an action for personal injuries in the Federal court for the eastern district of Pennsylvania. The action was against the Chicago, Burlington & Quincy Railway Company, incorporated in Iowa. The sole question presented in that case was the sufficiency of process for jurisdiction in the Federal court. The following facts were present:

The eastern point of the railroad was at Chicago, from which place its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers and the construction, maintenance and operation of the railroad for that purpose. According to the business [fol. 97] methods generally pursued, freight and passenger traffic was solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this business, defendant employed one Heller, supplied an office for him in Philadelphia, designated him as "district freight and passenger agent," and in many ways advertised these facts to the public. The business of the agent consisted of soliciting and procuring passengers and freight to be transported over the defendant's line. In conducting this business, the company employed several clerks and various traveling passenger and freight agents, who reported to and acted under the direction of the agent. The agent could not sell tickets or receive payment for transportation of freight. When a prospective passenger desired a ticket, he applied to the agent, who took the applicant's name and procured a ticket from one of the railroads running west from Philadelphia. The ticket was on a prepaid order, and the applicant, upon arriving in Chicago, had a right to receive from the defendant company a ticket over that road. At various times, the agent sold tickets to railroad employees who had tickets over intermediate lines. In some cases, to suit the convenience of shippers who had

received bills of lading from an initial line for goods routed over the defendant's lines, the agent gave in exchange therefor bills of lading over defendant's line. The bills of lading recited that they should not be in force until the freight had been actually received by defendant.

Touching the validity of the service upon the agent, the court said it depended upon

[fol. 98] " \* \* \* whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there."

The court further said:

"The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

This case has never been overruled, though in some cases it has been distinguished because of a different factual situation existing in the other cases. The rule announced in the above case has been followed by the United States Supreme Court eight times, by the Federal courts 112 times, and by the state courts 86 times. This court has adhered to the ruling in *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, supra.

Among the many cases upholding the rule just announced are: *St. Louis Southwestern Ry. Co. of Texas v. Alexander* (1913), 227 U. S. 218, 57 L. Ed. 486; *International Harvester Co. v. Kentucky* (1914), 234 U. S. 579, 58 L. Ed. 1479; *Tyler Co. v. Ludlow-Sayre Wire Co.* (1915), 236 U. S. 723, 59 L. Ed. 808; *People's Tobacco Co. v. American Tobacco Co.* (1918), 246 U. S. 79, 62 L. Ed. 587; *Minnesota Commercial Men's Association v. Benn* (1923), 261 U. S. 140, 67 L. Ed. 573; and *Davis v. Farmers Co-operative Co.* (1923), 262 U. S. 312, 67 L. Ed. 996.

In the *Harvester Co.* case, referred to by the majority as the leading case upon the subject, the facts were stated as follows:

"The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis.

Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there.

[fol. 99] "Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. *Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims.* When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts. \* \* \* (Italics mine.)

It will be noticed that I have italicized more of the facts than the majority. I have done this because I contend that the court took notice of all of the facts in the case, including "If any one in Kentucky owes the Company a debt, they [travelers] may receive the money, or a check, or a draft for the same. \* \* \*

On page 587 of the opinion, the court re-emphasized the facts by stating:

*"In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive*

payment in money, check or draft, and to take notes payable at banks in Kentucky. (Italics mine.)

The court upheld the Green case, but was of the opinion that it did not apply, because the factual situation was entirely different.

[fol. 100] The holding in the Harvester Co. case could not have been based entirely upon the continuous course or flow of business, because there was a continuous course of business conducted by the companies in both cases.

I call attention to the fact that the facts in the case at bar are like those in the Green case and entirely dissimilar to those present in the Harvester Co. case. The Green case is in point, and the latter case is not in point.

At this time, I desire to emphasize the point that this court has repudiated the continuous flow of business theory in *Brandtjen & Kluge, Inc. v. Nanson*, supra. In passing upon the question of the effect that the number of transactions had upon the question of doing business in this state, we stated:

"The appellant seeks to distinguish the case of *Smith & Co. v. Dickinson* by saying that, in that case, there was only proof of 'isolated transactions' in this state. However, the opinion in that case shows on its face that the transactions of the plaintiff were no more isolated than were the transactions in this case. *Whether a foreign corporation is doing business in this state does not depend upon the number of transactions that it has, but upon the nature and character of the transactions.*" (Italics mine.)

The majority stress the holding in *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, in which it was held that a continuous flow of interstate business constituted doing business by a corporation in a state foreign to its place of organization. The writer of the opinion based his holding upon the Harvester Co. case, but failed to note the factual situation present in that case, which was that, in addition to soliciting business, the Harvester Co. employees made collections for their company.

The Supreme Court of the United States, in the *People's Tobacco Co.* case, adhered to this idea by saying:

[fol. 101] "The plaintiff in error relies upon *International Harvester Co. v. Kentucky*, 234 U. S. 579, but in that case



the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State."

• The Federal courts in the following cases recognized that the holding in the International Harvester Co. case was grounded upon the fact that agents were doing business by making collections: *Hilton v. Northwestern Expanded Metal Co.*, 16 F. (2d) 821; *Cone v. New Britain Mach. Co.*, 20 F. (2d) 593; *Buffalo Batt & Felt Corporation v. Royal Mfg. Co.*, 27 F. (2d) 460; *Davega, Inc. v. Lincoln Furniture Mfg. Co.*, 29 F. (2d) 164. The facts and holding in the last case are so persuasive that I quote from them at length:

"(1) The defendant secured orders in New York through Shlivek for about \$200,000 of furniture per year;

"(2) The defendant sold in New York through Shlivek about \$1,000 of furniture per year, which had been shipped there for samples; Shlivek collected some overdue accounts.

"(3) The president and sales manager have come here 10 or 11 times a year, and while here have discussed business matters with Shlivek, and have also at times adjusted accounts with customers.

"(4) The sales manager, C. C. Lincoln, Jr., while in New York, arranged the contract for radio cabinets on which this action is brought, and has also solicited here other orders in radio cabinets.

"This is a very close case. The Supreme Court has said that the test of whether a foreign corporation is amenable to process depends upon whether it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there." *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. at page 265, 37 S. Ct. 280, 61 L. Ed. 710; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. at page 87, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; *Rosenberg Co. v. Curtis Brown Co.*, 260 U. S. at page 517, 43 S. Ct. 171, 67 L. Ed. 372. This is a

mere reiteration of the earlier statement by the same court that it 'has decided each case of this character upon the facts [fol. 102] brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction.' *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. at page 227, 33 S. Ct. 248, 57 L. Ed. 486.

'We are, in short, aided only by comparing those decisions in which the facts have been held to show the presence of corporations in foreign states, for the purpose of subjection to the jurisdiction, and the contrary. It has been definitely determined that the mere renting of an office and solicitation of business in the foreign state is insufficient to subject the corporation to service of process. *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U. S. 723, 35 S. Ct. 458, 59 L. Ed. 808; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537. Nor is the fact (if it be the fact, as is disputed) that the cause of action asserted here arose in New York material, unless the corporation was doing business in the sense that is required to subject it to jurisdiction. *Rosenberg Co. v. Curtis-Brown Co.*, 260 U. S. at page 51, 43 S. Ct. 170, 67 L. Ed. 372.

'The plaintiff says that much more was done here than the solicitation of orders, and especially relies on *International Harvester v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. In that case the travelling salesmen of the harvester company did far more than to take orders to be accepted outside of the state. While it was generally provided, as in the present case, that 'all contracts of sale must be made f. o. b. from some point outside of Kentucky, and the goods become the property of the purchaser when they are delivered to the carrier outside of the state,' the agents were authorized to receive money, checks, or drafts from any one within the state who might owe the company and take notes of customers payable therein.

'Here Shlivek [the agent] was paid nothing for collecting accounts. He received no salary, but was only paid a commission based on the contracts which originated through him, and not on the amount realized. He did not receive payment for the furniture shipped from Virginia, or even have a record of the accounts. He occasionally adjusted disputes, subject to the approval of the home office and

procured payment of *overdue* indebtedness. The president and vice president of the corporation came into New York a few times a year, and made, or sought to make, adjustments; but, if occasional adjustments of accounts within the state are to be regarded as sufficient to subject a corporation to the jurisdiction, no foreign corporation can solicit business in any volume without become liable to service of process. Such a result seems a sufficient answer to the suggestion that the adjustment of disputes with customers strengthens the plaintiff's case. The situation is different from that in the Harvester Case, where the course of business involved not collection of *overdue* accounts, but regular payment in the foreign state."

[fol. 103]. I can have no quarrel with the following cases cited by the majority, because in each of them the foreign corporation employed collectors in the state where they were working: *Lamont v. Moss Cigar Co.*, 218 Ill. App. 435; *George A. Hormel & Co. v. Ackman*, 117 Fla. 419, 158 So. 171; *Wheeler v. Boyer Fire Apparatus Co.*, 63 N. D. 403, 248 N. W. 521; *International Shoe Co. v. Lovejoy*, 219 Iowa 204, 257 N. W. 576; *Dobson v. Maytag Sales Corporation*, 292 Mich. 107, 290 N. W. 346.

In fact, the Wheeler case was based upon the entire holding in the Harvester Co. case, from which we have quoted at length.

The case of *American Asphalt Roof Corporation v. Shankland*, 205 Iowa 862, 219 N. W. 28, was based upon the Harvester Co. and Tauza cases, and the writer of the opinion was guilty of the same sin of omission as the writer of the Tauza case in that he did not give full credit to all of the facts in the Harvester Co. case.

In all of the other cases mentioned by the majority are to be found facts similar to those in the Harvester Co. case in that the foreign corporation allows its agents to make collections or to do some other item of local business.

This is especially true of *West Pub. Co. v. Superior Court*, 20 Cal. (2d) 720, 128 P. (2d) 777, in which it appears that the salesman accepted an initial payment upon books sold and helped collect delinquent accounts.

An exception is *Dahl v. Collette*, 202 Minn. 544, 279 N. W. 561, the writer of which case committed the same error charged in the Tauza case.

The case of Harbich v. Hamilton-Brown Shoe Co., 1 F. Supp. 63, was decided upon the factual situation shown by [fol. 104] affidavit. One of the affidavits indicated the following facts:

"After selecting the line of shoes that I desire for my trade, the sales agent then quotes me prices on these shoes and, if the prices are such that I conclude that I can use the shoes profitably, I accept his offer as quoted and direct him to ship me the shoes agreed upon, telling him the sizes that I desire for my trade and he transmits this order to the Hamilton-Brown Shoe Company and it delivers me the shoes in accordance with the trade I have made with its drummer or salesman."

Frene v. Louisville Cement Co., 134 F. (2d) 511, is not in point because the facts are entirely unlike those in the instant case. To show their difference, I quote as follows:

"However, it is admitted that he [Lovewell, the agent] frequently visits jobs in course of construction where the defendant's products are being used. On these occasions he would note the manner in which the products were being installed or used and if any difficulties were being experienced, he would make suggestions as to how to overcome them; he would also go over any complaints with regard to the materials and report them to the home office. He had no authority finally to make adjustments or compromises. Lovewell called at the plaintiffs' house three or four times during the course of construction and half a dozen times at another job then being done in the District for the Government. In connection with the latter, he took specimens of the work to government agents for testing purposes . . . to have approval by the Government. During these visits he inspected the work as it progressed, saw that the Brixment was properly mixed, was being properly spread, was being used as the defendant intended, and pointed out the values of different brick textures and bondings when used with Brixment. According to the plaintiff Leo Frene, Lovewell carefully looked over the plans and specifications for his house, visited the work regularly while in course of construction, and pointed out minor and major details to the brick-masons. Frene also stated he knew of many other jobs where said Lovewell has not alone sold the Brixment, but has participated in and

exhibited his engineering ability and fitness in order to promote and advance the general scheme of the work.'

"Lovewell testified that his employer 'told me to go on the job and see how they are progressing, how they like the material, how they are satisfied with it, and so forth' and 'the idea is to use my best judgment in promoting satisfactory use of this material.' The record further shows that Lovewell regularly secured information for his employer from various governmental agencies and departments, including the Bureau of Standards, the Procurement Division of the Treasury Department and the Government Printing Office. He admitted this work called upon 'his engineering ability and not his sales ability,' that it related [fol. 105] in part to specific matters affecting his employer's work, such as failure of its materials to pass government specification with resulting throwback by the contractor, and that the defendant would write instructing him to check up on the matter. He was useful also in securing more general information."

The above opinion contains a lengthy dissertation on the question of doing business. However, the essay has nothing to do with the factual situation present in the case nor with the applicable law. It is only an argument in favor of the so-called "modern trend."

A careful reading of the cases cited by the majority as upholding its contentions reveals that in only two of them, the Tauza and Dahl cases, do the facts coincide with those with which we are dealing.

It seems to me that the judgment should be reversed for two reasons: (1) that this court has at various times, upon facts alike to those present here, laid down a definite rule as to what constitutes doing business in this state, which rule is contrary to the one adopted by the majority; and (2) the cases from other jurisdictions have in fact announced rules contrary to those upon which the majority bases its holding.

Simpson, C. J.

I concur in dissent of Simpson, C. J. Millard, J.

[fol. 106] [File endorsement omitted.]



[fol. 106-1] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING—Filed January 26, 1945

Comes now the International Shoe Company, a corporation, appellant herein, and respectfully moves this Court for a rehearing of this cause.

[fol. 106-2] It is with a distinct feeling of "*mea culpa*" that the writer of this petition does so. We permitted the intense certainty of the soundness of our contention regarding the special appearance and objection to jurisdiction to overcome our thoughts regarding the *actual merits* of the cause and, in turn, led the Court into what we now consider an error.

It is stated in the majority opinion (page 5 of the type-written opinion):

"The principal question with which we are concerned is whether or not appellant was doing business in the State of Washington, *so as to make it amenable to process of the Courts of this State.*" (Emphasis ours)

Indeed, it was to this question that a large portion of all briefs and of the oral argument was devoted; but, actually, it is secondary.

The conclusion of the Court on this question is one with which we cannot agree, but on the other hand, the able opinion [fol. 106-3] of the majority so carefully considers all of the arguments and the authorities that were presented on this, the "principal question," that we feel it hopeless to write a petition to review it on that ground. So with the conclusion of the majority on this question we quarrel but accept as final in this Court.

This petition is based on assignment of error number three, as found in appellant's opening brief which is as follows:

"The Court erred in finding that the unemployment commission had jurisdiction to levy an assessment against appellant for contribution to the unemployment compensation fund." (Page 11, appellant's opening brief)

Argument on that assignment commences on page 26 of this brief. The argument raises the constitutional question

based upon three separate parts of the Constitution of the United States.

Article I, Sec. 8:

"The Congress shall have power . . . to regulate [fol. 106-4] Commerce . . . among the several states."

Fifth Amendment:

"No person shall . . . be deprived of . . . property without due process of law."

Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

This Court duly considered the argument advanced by the first of these Constitutional objections and held that the tax was not a burden on interstate commerce. With this conclusion, we likewise disagree, but accept as final in this Court.

There remains, however, the Fifth and Fourteenth Amendments and to this important question *not one single word is written in either the majority or minority opinions of this Court.*

[fol. 106-5] As we stated earlier in this petition we feel entirely at fault for permitting our enthusiasm on the objection to jurisdiction to cause us to neglect what is obviously the *more important question*, namely: the *right of the State to levy the tax.*

This question does not concern interstate commerce or burden upon it. It is simply a matter of the right of this State to tax a *non-resident, a person who isn't here.*

In the majority opinion in this case the Court has gone to great pains to point out that the test of presence within the State so as to subject a foreign corporation to service of process is vastly different from the test to be applied for determination of presence within the State for other purposes.

With this distinction we do not quarrel; in fact, we agree, and while we maintain that the International Shoe Com- [fol. 106-6] pany is not within the State so as to subject it

to the processes of the Court, we will concede for the purpose of this petition that it is so.

From this conclusion this Court simply assumes that, being here so as to be subject to process, the corporation is here so as to be subject to tax; *with this we take sharp issue.*

The assumption is in reverse logically. It holds that since the corporation is subject to process to collect the tax it is subject to the taxing powers of the State. The correct and logical approach would be to determine first whether or not the corporation was subject to the tax and, second, whether or not it is subject to the processes of the States to collect the tax.

There are, we conceive, two categories into which all taxes can be divided:

1—*In personam.*

2—*In rem.*

[fol. 106-7]—The tax here in question is not against property; therefore, not “in rem” but is against the *privilege* of employment. *Bates v. McLeod*, 11 (Wn. (2d) 648, 120 P. (2d) 472, and, therefore, must be “in personam.”

A cause adjudicated by the Supreme Court of the United States considers the right of a State to subject tangible personal property located in another State to Inheritance Tax. We quote from that decision:

“This precise question has not been presented to this Court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a state of a tax which if it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction *it cannot give them any extra-territorial operation.* . . .

“ . . . The Pennsylvania statute is a tax law, not [fol. 106-8] an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. *But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either with-*

out such jurisdiction is mere extortion and in contravention of due process of law." (Emphasis ours)

*Frick v. Commonwealth of Penn.*, 45 S. C. 603,  
268 U. S. 473, 66 L. ed. 1058.

"The power of taxation, however, vast in its extent, is necessarily limited to subjects, *within the jurisdiction of the state*. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects." (Emphasis ours)

*Cleveland P. & A. R. R. Co. v. Commonwealth of Penn.*, 15 Wall. 300, 21 L. ed. 179.

These cases are cited for the purpose of showing the [fol. 106-9] Court that the abuse of taxing powers is a contravention of the Fourteenth Amendment to the Federal Constitution.

The decision in this cause has, we believe, gone as far as any Court in the nation, state or federal, in holding that the appellant is subject to process of the courts, but as the majority opinion points out, this is a far cry from holding the corporation to be a resident of the State for *other purposes*. Certainly, the imposition of a tax is *another purpose*.

To enable us to more fully present to the Court argument on this one point, we earnestly petition for a rehearing of this cause.

Respectfully submitted, Stern & Stern and Allen  
Orton and T. M. Royce, Attorneys for Appellant-  
Petitioner.

1912 Smith Tower, Seattle 4, Washington.

[fol. 107] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed February 6,  
1945

The court having considered the appellant's petition for a rehearing herein,

It Is Ordered that the petition for rehearing be and it is hereby denied.

Dated this 6th day of February, 1945.

By the Court, Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 108] IN THE SUPREME COURT OF WASHINGTON

INTERNATIONAL SHOE COMPANY, a Corporation, Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND PLACEMENT and E. B. Riley, Commissioner, Respondents

JUDGMENT—February 6, 1945

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 6th day of February, A. D. 1945, on motion of Smith Troy, and George W. Wilkins, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington, Office of Unemployment Compensation and Placement, and E. B. Riley, Commissioner, have and recover of and from the said International Shoe Company, a corporation, and from United States Fidelity and Guaranty Company, surety, the costs of this action



taxed and allowed at One hundred thirty-seven and 41/100 (\$137.41) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 109] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL AND PRAYER FOR REVERSAL—Filed May 3, 1945

To the Hon. Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington:

Comes Now the International Shoe Company, a corporation, the above named appellant, by its attorneys, Leopold M. Stern and T. M. Royce, and respectfully shows that it is a citizen of the United States of America, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; that in the above entitled cause, on the 6th day of February 1945, the Supreme Court of the State of Washington, sitting en banc, the highest court of said State in which a decision in said cause could be heard, rendered a certain en banc final decision and judgment against said appellant, and in favor of the respondents in said Court, namely, the State of Washington, Office of Unemployment Compensation and Placement, and E. B. Reilly, Commissioner, affirming a certain judgment for the sum of \$3159.24 against appellant and in favor of said respondents rendered by the Superior Court of the State of Washington for King County on the 10th day of November 1943, which [fol. 110] in turn affirmed the levy of an assessment made by said respondents against said appellant on the 11th day of February 1943 for the sum of \$3159.24 for contributions to the Unemployment Compensation Fund of respondents, found to be due from appellant to respondents for the period of January 1, 1937 through December 31, 1941.

In its said final en banc decision and judgment it was adjudged by the Supreme Court of Washington that the provisions of Chapter 253 of the Session Laws of 1941 of Washington, page 870 et seq. and of Chapter 214 of the Session Laws of 1939 of Washington, page 818 et seq.,

which require employers engaged in interstate commerce to make contributions to the Unemployment Fund of the Department of Unemployment Compensation and Placement of the State of Washington, are not in conflict with the provisions of Section 8 of Article I of the Constitution of the United States which provide that no state shall enact any law regulating interstate commerce; and are not in conflict with the provisions of Sec. 1 of Article 14 of the Amendments to the Constitution of the United States, which provide that no citizen shall be deprived of property without due process of law.

In its said final en banc decision and judgment in the above entitled cause it was also adjudged by said Supreme Court that the provisions of said Chapter 253 of the Laws of 1941 and of Chapter 127 of the Session Laws of Washington of 1893, page 407 et seq., and of Chapter 86 of the Session Laws of Washington of 1895, page 407 et seq., which provide that notice of assessment for contributions claimed due the unemployment fund may be served upon a corporation foreign to the State of Washington, and which does no intrastate business in the State of Washington, by the delivery of a copy of such notice of assessment to any agent of such foreign corporation, and which provide that if the amount so assessed is not paid within ten days after service of such notice the amount stated shall be collected by the Commissioner of said Department by the distraint, seizure and sale of the property of such employer, are not in conflict [fol. 111] with the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States which provide that no citizen shall be deprived of property without due process of law.

All of the said rulings of the Supreme Court of the State of Washington in its said en banc decision and judgment appear in the record opinion, decision and final judgment of said Supreme Court rendering judgment against petitioner.

Petitioner and appellant has filed with this petition, with the Clerk of said Supreme Court of the State of Washington, an assignment of errors, setting out separately and particularly each error asserted by it, and also presents herewith a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Wherefore your petitioner prays the allowance of an appeal from said judgment of the Supreme Court of the State of Washington to the Supreme Court of the United States, to the end that the record in said matter may be removed into the said Supreme Court of the United States and the errors complained of by petitioner be examined and corrected and said judgment reversed.

International Shoe Company, Petitioner, by Leopold M. Stern; T. M. Royce, Attorneys for Petitioner.

Smith Tower, Seattle.

[File endorsement omitted.]

[fol. 112] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 3, 1945

Comes Now the appellant International Shoe Company and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Washington, in the above entitled matter, there is manifest error in this, to-wit:

# I

The Court erred in holding that the provisions of Chapter 253 of the Laws of 1941 of Washington, page 870 et seq., and particularly Sec. 14 of Chapter 253 of the Session Laws of Washington of 1941, page 904 et seq.; (Rem. Rev. St. 1941 Suppl. page 521-522, Sec's. 9998-c-e), and of Chapter 127 of the Session Laws of Washington, and particularly Paragraph 9 of Sec. 7 of Chapter 127 of the Session Laws of Washington of 1893, page 407 et seq. (2 Rem. Rev. St. Sec. 226), and of Chapter 86 of the Session Laws of Washington of 1895, page 170 (2 Rem. Rev. St. Sec. 220), are not in conflict with and in violation of the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, because the State of Washington by and through the provisions of said chapter assumes and seeks to deprive the appellant and other citizens of the United States of property without due process of law.

## II

The Court erred in holding that by the provisions of said Acts the appellant is not deprived of property without due process of law.

[fol. 113]

## III

The Court erred in holding that the provisions of Chapter 214 of the Session Laws of Washington of 1939 and particularly Paragraph g(1) of Section 16 of Chapter 214 of the Session Laws of 1939 of Washington, page 856 (10 Rem. Rev. St. pocket part sec. 9998-119(g)(1), page 326), and of Chapter 253 of the Laws of Washington of 1941, and particularly Sections 4, 5, 11 and 14 of Chapter 253 of the Session Laws of Washington of 1941, page 870 et seq. (Rem. Rev. St. 1941 Suppl. sec. 9998-106-107-114-119, page 499 et seq.) are not in violation of Section 8 of Article I of the Constitution of the United States which confers upon Congress the exclusive power to regulate commerce among the several states.

## IV

A. The Court erred in holding that the said state statutes do not place burdens upon interstate commerce.

## V

The Court erred in holding that the provisions of said Chapter 214 of the Session Laws of Washington of 1939 and particularly of paragraph (g) (1) of Section 16 of Chapter 214 of the Session Laws of Washington of 1939, page 856, and the provisions of said Chapter 253 of the Session Laws of Washington of 1941, and particularly of Sections 4, 5, 11 and 14 of Chapter 253 of the Session Laws of Washington of 1941, page 870 et seq. are not in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, which provides that no citizen shall be deprived of property without due process of law.

## VI

The Court erred in holding that said state statutes do not place burdens upon interstate commerce.

[fol. 114]

## VII

The Court erred in ordering judgment to be entered against the appellant.

## VIII

The Court erred in declaring and decreeing that said Chapter 214 of the Session Laws of Washington of 1939, and particularly of Paragraph g(1) of Section 16 of Chapter 214 of the Session Laws of 1939 of Washington, page 856, and said Chapter 253 of the Session Laws of Washington of 1941 and particularly Sections 4, 5, 11 and 14 of Chapter 253 of the Session Laws of Washington of 1941, page 870 et seq., were constitutional and valid and did not violate Section 8, Article 1 of the Constitution of the United States, and did not violate Section 1 of Article 14 of the Amendments to the Constitution of the United States.

## IX

The Court erred in declaring and adjudging that said Chapter 253 of the Session Laws of Washington of 1941, and particularly Section 14 of Chapter 253 of the Session Laws of Washington of 1941, page 904, and said Chapter 127 of the Session Laws of Washington of 1893, and particularly Paragraph 9 of Section 7 of Chapter 127 of the Session Laws of Washington of 1893, page 407, and said Chapter 86 of the Session Laws of Washington of 1895, page 170, are constitutional and valid and do not violate Section 1 of Article 14 of the Amendments to the Constitution of the United States.

Leopold M. Stern, T. M. Royce, Attorneys for Appellant, International Shoe Company.

[File endorsement omitted.]

[fol. 115] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 3, 1945

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and



entered in the above entitled suit, by the Supreme Court of the State of Washington, on the 6th day of February 1945, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided; it is now here

Ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington, in the above entitled cause; as provided by law; and it is further

Ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record, proceedings and judgment in this cause, and transmit the same to the Clerk of the Supreme Court of the United States, so that he shall have the same in said Court within sixty (60) days of this date; and it is further [fol. 116] Ordered that the suspending bonds now on file with the Supreme Court of the State of Washington in the above entitled suit remain in full force and effect throughout the pendency of said appeal proceedings; that security for costs on appeal be fixed in the sum of Six Thousand Dollars (\$6,000.00) and that upon approval of bond in said amount this order shall operate as a supersedeas.

Dated at Olympia, Washington, this 3rd day of May, 1945.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

[fol. 117] Citation in usual form showing service on Smith Troy, et al., filed May 3, 1945, omitted in printing.

[fols: 118-221] Bond on appeal for \$6,000.00 approved and filed May 3, 1945, omitted in printing.

[fol. 222] IN THE SUPREME COURT OF WASHINGTON

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 4, 1945

To the Clerk of said Court:

You Are Hereby Requested to make a transcript of the record to be filed with the Supreme Court of the United States pursuant to an appeal in the above styled cause, and to include in said transcript of record the following papers and exhibits, to-wit: The following papers from the transcript on appeal from the Superior Court.

1. Commissioners Record,
2. Notice of Appeal to the Superior Court for King County,
3. Judgment of the Superior Court for King County;
4. All documents and papers filed on behalf of International Shoe Company, appellant, to perfect appeal to the Supreme Court of the State of Washington, including specifically:
  - a. Notice of appeal and appeal bond,
  - b. Appellant's opening Brief,
  - c. Opinion of the Supreme Court of the State of Washington filed January 4, 1945,
  - c-a. Petition for Rehearing,
  - d. Order Denying Petition for Rehearing filed February 6, 1945
  - e. Judgment of the Supreme Court of February 6, 1945,
5. The Petition for Appeal to the Supreme Court of the United States and proof of service
6. The Assignment of errors by parties representing the International Shoe company, and proof of service,
- [fol. 223] 7. The Order allowing Appeal and fixing amount of bond,
8. The citation of appeal to State of Washington, Office of Unemployment Compensation and Placement, and E. B. Reilly, Commissioner, respondents, signed by the Chief Justice of the Supreme Court of the State of Washington, and proof of service,
9. The bond for costs and supersedeas on appeal, and approval thereof,

10. Notice to respondent of petition for and allowing appeal and other papers with notice to Supreme Court Rule 12, Paragraph 3, and proof of service,

11. Statement as to Jurisdiction,

12. This praecipe and acknowledgment, and proof of service, said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States on or before the 1st day of July, 1945.

Leopold M. Stern, T. M. Royce, Attorneys for Appellant International Shoe Company.

Copy of the Within Praecipe received and service thereof acknowledged this 3d day of May, 1945.

Smith Troy, Attorney General of the State of Washington; Gerald B. Hile, Acting Attorney General of the State of Washington; George W. Wilkins, Assistant Attorney General of the State of Washington.

[File endorsement omitted.]

[fol. 224]- [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF SERVICE—Filed May 15, 1945

STATE OF WASHINGTON,  
County of King, ss:

T. M. Royce, being first duly sworn, on oath deposes and says: That he is the attorney for the appellant in the above entitled action; that on the 3rd day of May 1945 affiant served upon the respondents in the above entitled action full true and correct copies of the following papers in said action: The Petition for Appeal to the Supreme Court of the United States; The Assignment of Errors by parties representing the International Shoe Company; The Order allowing Appeal and fixing amount of bond; The citation of appeal to State of Washington, Office of Unemployment Compensation and Placement, and E. B. Reilly, Com-

missioner, respondents, signed by the Chief Justice of the Supreme Court of the State of Washington; The bond for costs and supersedeas on appeal, and approval thereof; Notice to respondent of petition for and allowing appeal and other papers with notice to Supreme Court Rule 12, Paragraph 3; Statement as to Jurisdiction, and Praecipe for Transcript of Record,—the originals of which are on file with the Clerk of the above entitled Court, by delivering to and leaving the same with George V. Wilkins, Assistant Attorney General for the State of Washington, in Olympia, Thurston County, Washington.

T. M. Royce.

Subscribed and sworn to before me this 15th day of May, 1945. Craig Travis, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

[fol. 225] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 226-227] IN THE SUPREME COURT OF THE UNITED STATES  
STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD—  
Filed June 6, 1945

Comes Now the appellant, International Shoe Company, in the above entitled cause, and adopts its respective assignments of error as its statement of points to be relied upon, and states that the whole of the record as filed is necessary for a consideration of the case.

John L. Sullivan, Lawrence J. Bernard, Counsel for Appellant, Stoneleigh Court, 1025 Connecticut Ave., Washington, D. C.; Leopold M. Stern, T. M. Royce, Of Counsel for Appellant, Seattle, Washington.

Copy of above and foregoing statement received and due service thereof acknowledged this 24 day of May, 1945.

Smith Troy, Attorney General of the State of Washington; Gerald D. Hile, Acting Attorney General of the State of Washington; George W. Wilkins, Assistant Attorney General of the State of Washington, Attorneys for Appellees.

[fol. 228] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 18, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket. The Court does not care to hear argument on the question whether the statutes attacked place an undue burden on interstate commerce.

Mr. Justice Roberts took no part in the consideration of this question.

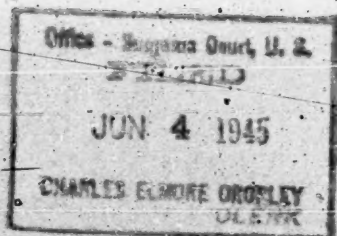
Endorsed on Cover: File No. 49,798. Washington, Supreme Court, Term No. 107. International Shoe Company, Appellant, vs. State of Washington, Office of Unemployment Compensation and Placement and E. B. Riley, Commissioner. Filed June 4, 1945. Term No. 107 O. T. 1945.

(9802)





FILE COPY



**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 145 107**

**INTERNATIONAL SHOE COMPANY,**

*Appellant,*

*vs.*

**STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER.**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF  
WASHINGTON**

**STATEMENT AS TO JURISDICTION**

**LEOPOLD M. STERN,  
T. M. ROYCE,  
LAWRENCE J. BERNAED,  
JOHN L. SULLIVAN,**  
*Counsel for Appellant.*



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IN THE SUPREME COURT OF THE STATE  
OF WASHINGTON

No. 29296

INTERNATIONAL SHOE COMPANY, *a Corporation,*  
*Appellant,*

*vs.*

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER,

*Respondents.*

**STATEMENT IN SUPPORT OF JURISDICTION**

The appellant, International Shoe Company, a corpo-  
ration, in support of the jurisdiction of the Supreme Court  
of the United States to review the above entitled cause on  
appeal, respectfully represents:

A.

**Statutory Provisions Sustaining Jurisdiction**

The statutory provision which sustains the jurisdiction  
of the Supreme Court of the United States is Section 344(a)  
of Title 28 of the United States Code, reading, to the ex-  
tent relevant here, as follows:

"Sec. 344(a). Final judgment or decree in any suit  
in the highest court of a State in which a decision could  
be had . . . where is drawn in question the valid-  
ity of a statute of any State, on the ground of its being  
repugnant to the Constitution, treaties or laws of the  
United States, and the decision is in favor of its valid-  
ity, may be reviewed by the Supreme Court upon a  
writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

## B.

### Statutes of the State the Validity of Which Is Involved

The statutes of the State of Washington the validity of which has been sustained by a final judgment of the Supreme Court of the State of Washington, sitting *en banc*, the highest court of said State, as not being violative of or repugnant to the Constitution and laws of the United States are Chapter 253 of the Session Laws of Washington of 1941, page 870 *et seq.* and particularly Sections 4, 5, 11 and 14 of Chapter 253 of the Laws of 1941, pages 881, 884, 904 and 915 respectively (Rem. Rev. Stat. 1941 Suppl. Sec. 9998-102 *et seq.*, page 493 *et seq.*; Sec. 4, p. 881; Sec. 5, p. 884; Sec. 11, p. 904, Sec. 14, p. 915), and of Chapter 214 of the Session Laws of Washington of 1939, page 818 *et seq.* and particularly paragraph (g)(1) of Section 16 of Chapter 214, Session Laws of Washington of 1939, page 856, (10 R. R. S. pocket part Sec. 9998-199 (g)(1), page 326) which provide for the levy of assessment for contribution to the Unemployment Compensation Fund of the State of Washington.

The pertinent portions of these statutes are:

“Chapter 253 (Laws of 1941 of Washington, page 870 *et seq.*)

“UNEMPLOYMENT COMPENSATION.

“AN ACT relating to unemployment compensation, amending chapter 162 of the Laws of 1937, as amended by chapter 214 of the Laws of 1939, repealing sections 19, 22 and 23 of chapter 162 of the Laws of 1937 and section 17 of chapter 214 of the Laws of 1939, establishing liens and providing for the enforcement thereof.

"SECTION 4. Section 6 of chapter 162 of the Laws of 1937, as amended by section 4 of chapter 214 of the Laws of 1939, is hereby amended to read as follows:

"Section 6. (c) APPEALS. When an appeal is taken, as provided in the foregoing section, unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the unemployment compensation division. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision on the claim, unless within ten days after the date of notification or mailing, whichever is the earlier, of such decision, further appeal is initiated pursuant to section 6 (e).

"Section 6. (d) APPEAL TRIBUNALS. The Commissioner shall establish one or more impartial appeal tribunals each of which shall be presided over by a salaried Examiner who shall decide the issues submitted to the tribunal. No Examiner shall hear or decide any disputed claim in any case in which he is an interested party.

"Section 6. (e) REVIEW. The Commissioner may on his own motion, or upon the petition of any interested party, shall, affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. The Commissioner may transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal.

"Section 6. (i) COURT REVIEW. Within thirty days after final decision has been communicated to any interested party, such interested party may appeal to the Superior Court of the county of his residence, and such appeal shall be heard as a case in equity but

upon such appeal only such issues of law may be raised as were properly included in his application before the appeal tribunal. The proceedings of every such appeal shall be informal and summary, but full opportunity to be heard upon the issues of law shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail or personally on the Commissioner, and the filing and service of said notice of appeal within thirty days shall be jurisdictional. The Commissioner shall within twenty days after receipt of such notice of appeal serve and file his notice of appearance upon appellant or his attorney of record, and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Superior or the Supreme Courts. When a notice of final decision has been placed in the United States mail properly addressed, it shall be considered prima facie evidence of communication to the appellant and his attorney if of record.

"The Commissioner shall serve upon the appellant and file with the Clerk of the Court before trial a certified copy of his complete record of the claim, which shall upon being so filed become the record in such case. No fee of any kind shall be charged the Commissioner for filing his appearance or for any other services performed by the Clerk of either the Superior or the Supreme Court.

"If the Court shall determine that the Commissioner has acted within his power and has correctly construed the law, the decision of the Commissioner shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Commissioner with an order directing him to proceed in accordance with the findings of the Court: PROVIDED, That any award shall be in accordance with the schedule of unemployment benefits set forth in this act.

"It shall be unlawful for any attorney engaged in any such appeal to the Courts as provided herein to

charge or receive any fee therein in excess of a reasonable fee to be fixed by the Courts in the case, and if the decision of the Commissioner shall be reversed or modified, such fee and the fees of witnesses, and the costs shall be payable out of the Unemployment Compensation Administration Fund. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court to the Supreme Court as in other civil cases. In all Court proceedings under or pursuant to this act the decision of the Commissioner shall be prima facie correct, and the burden of proof shall be upon the party attacking the same.

(Sec. 4, Chap. 253 Laws 1941, p. 881 Rem. Rev. St. 1941 Suppl. Sec. 9998-106 c-d-e, pages 501-503.)

“SECTION 5. Section 7 of chapter 162 of the Laws of 1937, as amended by section 5 of Chapter 214 of the Laws of 1939, is hereby amended to read as follows:

“Section 7. (a) PAYMENT.

“(1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 19 (g)) occurring during such calendar year, such contributions shall become due and be paid by each employer to the treasurer for the fund in accordance with such regulation as the Commissioner may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ;

“Section 7. (b) RATE OF CONTRIBUTION. Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:



“(1) One and eight-tenths (1.8%) per centum with respect to employment during the calendar year 1937;

“(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years thereafter.

(Sec. 5, Chap. 253 Laws of Washington 1941, p. 884; Rem. Rev. St. 1941 Suppl. Sec. 9998-107 a-b, p. 504.)

“SECTION 11. Section 14 of Chapter 162 of the Laws of 1937 as amended by Section 12 of Chapter 214 of the Laws of 1939 is hereby amended to read as follows:

“Section 14 (c). At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except that if the employer cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last known address by registered mail. If the amount so assessed is not paid within ten days after such service or mailing of said notice, the Commissioner or his duly authorized representative shall collect the amount stated in said assessment by the distraint, seizure and sale of the property, goods, chattels and effects of said delinquent employer. There shall be exempt from distraint and sale under this section such goods and property as are exempt from execution under the laws of this state.”

“Section 14 (e). When any notice of assessment has been delivered or mailed to a delinquent employer, as heretofore provided, such employer may within ten

days thereafter file a petition in writing with the Commissioner, stating that such assessment is unjust or incorrect and requesting a hearing thereon. Such petition shall set forth the reasons why the assessment is objected to and the amount of contributions, if any, which said employer admits to be due the Division of Unemployment Compensation. If no such petition be filed with the Commissioner within said ten days, said assessment shall be conclusively deemed to be just and correct. The filing of a petition on a disputed assessment with the Commissioner shall stay the distraint and sale proceedings provided for in this section until a final decision thereon shall have been made, but the filing of such a petition shall not affect the right of the Commissioner to perfect a lien, as provided in section 14 (b), upon the property of the employer. The issues raised by such petition shall be heard by the appeal tribunal, established in section 6 of this act, in the same manner and in accordance with the same procedure as is prescribed for appeals from benefit determinations, including the procedure set out in section 6 for review by the Commissioner and the Court.

(Sec. 11, Chap. 253 of Laws of Washington of 1941, p. 904; Rem. Rev. St. 1941 Suppl. Sec. 9998-114 c.c. p. 521-522.)

SECTION 14. That section of chapter 214 of the Laws of 1939 which passed both houses of the Legislature as section 16, and which appears in chapter 214 of the Laws of 1939 as an unnumbered section due to the number thereof having been included in a veto of a portion thereof by the Governor, which section is designated as section 9998-119 (a) of Remington's Revised Statutes (Supp.), is hereby amended to read as follows:

"Section 19 (c). 'Commissioner' means the administrative head of the State Office of Unemployment Com-

pensation and Placement referred to in section 10 of this act.

"Section 19 (d). 'Contributions' means the money payments to the state unemployment compensation fund required by this act.

"Section 19 (e). 'Employing Unit' means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ one or more individuals performing services for it within this state. . . .

"Section 19 (f). 'Employer' means: . . .

"(2) Prior to July 1, 1941:

"(a) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week);

"Section 19 (g) (2). The term 'employment' shall include an individual's entire service performed within or both within and without this state if:

"(i). The service is localized in this state; or

"(ii) The service is not localized in any state but some of the service is performed in this state and

"(a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or

“(b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

“(3) Services not covered under paragraph (2) of this section, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the Federal government, shall be deemed to be employment subject to this act if the individual performing such services is a resident of this state and the Commissioner approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

“(4) Service shall be deemed to be localized within a state if:

“(i) The service is performed entirely within such state, or

“(ii) The service is performed both within and without such state, but the service performed without the state is incidental to the individual's service within such state, for example, is temporary or transitory in nature or consists of isolated transactions.”

(Sec. 14, Chap. 253, Session Laws of Washington, 1941, p. 915; Rem. Rev. St.; 1941 Suppl., Sec. 9998-c-d-e-f-g, p. 529-531.)

SECTION (g) (1) of Section 16 of Chapter 214, page 856, of the Session Laws of Washington of 1939, is as follows:

#### “CHAPTER 214

#### “UNEMPLOYMENT COMPENSATION ACT

“Sec. 16.

“(g) (1). ‘Employment,’ subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under

any contract of hire, written or oral, express or implied."

(10 R. R. S. pocket part, p. 326, Sec. 9998-119 (g) (1). Additional statutes of the State of Washington the validity of which has been sustained in this case by a final judgment of the Supreme Court of the State of Washington sitting en banc, the highest court of said State, as not being violative of or repugnant to the Constitution and Laws of the United States are Chapter 253 of said Session Laws of Washington of 1941, page 870, et seq. (Rem. Rev. St. 1941 Suppl. Sec. 9998-102 et seq., page 493 et seq.) and particularly Section 11 of said Chapter 253, page 904 (Rem. Rev. St. 1941 Suppl. Sec. 9998-114, page 521, 522) and Chapter 127 of the Session Laws of Washington of 1893, page 407 et seq. and particularly paragraph 9 of Section 7 of said Chapter 127, page 410, (2 Rem. Rev. St. 226) and Chapter 86 of the Laws of Washington of 1895, page 170, and particularly Section 1 of said Chapter 86, page 170, (2 Rem. Rev. St. Sec. 220,) which provide for the manner of the levy of an assessment against foreign corporations for contribution to the Unemployment Compensation Fund of the State of Washington. These sections and paragraphs are:

Section 11 of Chapter 253 of the Session Laws of 1941, p. 904, is set forth above at pages 7 and 8, (R. 127-128). It provides that notice of delinquent assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action.

Section 1 of Chapter 86 of the Session Laws of the State of Washington of 1893, p. 170, so far as pertinent, provides:

"Section 1. Civil actions in the several superior courts of this state shall be commenced by the service of a summons as hereinafter provided; \* \* \*" (R. R. S., Vol. 2, sec. 220).



Paragraph 9 of Section 7 of Chapter 127 of the Session Laws of the State of Washington of 1893, p. 410, provides:

"Section 7. The summons shall be served by delivering a copy thereof as follows:

(9) If the suit be against a foreign corporation or non-resident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof" (R. R. S., Vol. 2, sec. 226).

Said Chapter 214 of the Session Laws of Washington of 1939, and particularly paragraph (g) (1) of Section 16 of said Chapter 214 (p. 856) and said Chapter 253 of the Laws of 1941, and particularly Sections 4, 5, 11 and 14 of said Chapter 253 (pp. 881, 884, 904, 915) are believed to be in conflict with Section 8 of Article I of the Constitution of the United States and to be in conflict with Section 1 of Article 14 of the Amendments to the Constitution of the United States.

Said Chapter 127 of the Laws of Washington of 1893, and particularly paragraph 9 of Section 7 of said Chapter 127 (p. 410) and Chapter 86 of the Laws of Washington of 1895, and particularly Section 1 of said Chapter 86 (p. 170) and Chapter 253 of said Session Laws of Washington of 1941, and particularly Section 11 of said Chapter 253 (page 904), are believed to be in conflict with Section 1 of Article 14 of the Amendments to the Constitution of the United States.

### C

#### **Date of Judgment and Date of Application for Appeal**

The date of the judgment or decree of the Supreme Court of the State of Washington, sitting en banc, which is now sought to be reviewed, was February 6, 1945. The appellant's motion for rehearing was denied on February 6, 1945. The date for taking the appeal began to run on the date of

the denial of said motion for a rehearing, to-wit: February 6, 1945. *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31; *Puget Sound Power & Light Co. v. King County*, 264 U. S. 22.

The date upon which the application for appeal was presented and the appeal allowed was May 3d, 1945.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellant may bring its appeal within three months after entry of the decree of the Supreme Court of the State of Washington.

## D

### Nature of the Case and Rulings Below

The proceedings involved in this action were commenced by the Department of Unemployment Compensation and Placement of the State of Washington, hereinafter referred to as "the Department," to recover contributions claimed to be due from the appellant for the period of January 1, 1937, through December 31, 1941. They were commenced by a notice of delinquent assessment by the Commissioner of the Department which was personally served upon Edward S. Alley, a salesman employed by the appellant, in King County, Washington, on October 10, 1941 and mailed to the appellant at its office in St. Louis, Missouri. (R. 3.)

On October 18, 1943 the appellant filed a special appearance with the Department and moved to quash the service upon Mr. Alley upon the following grounds:

(1) That service of the notice of assessment upon Mr. Alley was not good service upon the appellant;

(2) That the appellant is a corporation organized and existing under and by virtue of the laws of Delaware, and is not engaged in doing business within the State of Wash-

ington; that it has no agent or other person within the State of Washington upon whom service of process may be made; that it is doing only interstate business;

(3) That the appellant is not an employer and does not furnish employment within the State of Washington within the meaning of those terms as defined by the unemployment compensation act. (R. 4.)

The appellant requested a hearing and, pursuant to such request, the matter came on for hearing before the appeal tribunal of the Department as set up in said Chapter 253 of the Session Laws of 1941, upon an agreed statement of facts supplemented by the testimony of Edward Alley. (R. 6-27.)

The agreed statement of facts and the testimony of Mr. Alley showed: Appellant is a corporation organized under the laws of the State of Delaware, with its principal place of business in St. Louis, Missouri. Its principal business is the manufacture and sale of boots and shoes, which it manufactures in states other than the State of Washington. Its goods are sold in Washington through its sales units, or branches, also located outside of the State of Washington. Appellant has no place of business in Washington, and makes no contracts either for sale or purchase in Washington. It maintains no stock of merchandise in Washington and makes no deliveries of goods in intrastate commerce in Washington. In its business in Washington for four years, 1937 through 1940, appellant employed 11 to 13 salesmen, all of whom resided in Washington and whose principal activities were in Washington during those years. Commissions paid to these salesmen amounted in 1937 to \$36,098.19; in 1938 to \$32,075.63; in 1939 to \$33,846.44; and in 1940 to \$31,879.19. These salesmen are under the direct supervision and control of salesmanagers located in St. Louis. Each salesman has a designated territory within the State. Salesmen have a sample line consisting of

one shoe of a pair. These samples belong to appellant and are given to the salesmen to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and some maintain no permanent sample rooms but rent rooms in hotels or business buildings in the various cities in their territory. The expense of such rental is paid by the salesman, and he is later reimbursed by appellant. The authority of the salesman is limited to exhibiting to merchants who are probable buyers samples of goods for which he solicits orders, endeavoring to procure orders on prices and terms fixed by appellant. If orders are obtained the salesman transmits them to appellant's office in St. Louis, for acceptance or rejection. If the orders are accepted by appellant, the goods called for by such orders are shipped f.o.b. shipping point, from outside Washington. The goods which are shipped into Washington are invoiced at the point of shipment, from which point collections are made. No salesman has authority to bind appellant to any contract or to finally conclude any transaction in its behalf, nor can he make any collections. Salesmen are not permitted to engage in an independently established trade, occupation, profession or business of the same nature as is involved in their employment by appellant.

On October 10, 1941 a copy of a notice of assessment issued by the Commissioner of Unemployment Compensation and Placement was delivered to and left with E. S. Alley, a salesman of the International Shoe Company, at Seattle, Washington, demanding payment of delinquent contributions and interest, in the sum of \$6000. Said sum was not arrived at by calculation of the wages earned by salesmen of the appellant within the State of Washington but was an arbitrary figure set by the Commissioner. Mr. Alley is a salesman of the International Shoe Company, employed

upon the terms and under the authority and for the purposes as hereinabove stated for employees of appellant within the State of Washington. A copy of the same notice of assessment was also placed in the United States mails, postage fully prepaid, addressed to appellant at St. Louis, Missouri, on October 10, 1941. On October 18, 1941 appellant filed with the Department of Unemployment Compensation and Placement its special appearance, motion to quash service and objection to jurisdiction. A computation was a part of the stipulated facts showing that the amount of the assessment based upon the actual earnings of the salesmen should be \$3159.24.

The stipulation recited that it was made for the purpose of presenting to the appeal examiner and such other tribunals as this matter might come before upon appeal, or otherwise, questions raised in this proceeding by the special appearance, motion to quash service and objection to the jurisdiction filed in this proceeding by appellant, but that the stipulation of facts should not constitute a general appearance by appellant. (R. 22.)

On January 25, 1943 the appeal tribunal rendered its decision wherein it denied appellant's motion to quash and held that the Commissioner was authorized to recover from appellant for the period above mentioned contributions in the sum of \$3159.24. (R. 28-39.)

A petition was duly filed by the appellant with the Commissioner of the Department, to review the decision of the appeal tribunal. The Commissioner thereafter reviewed such decision, and on February 11, 1943 entered an order confirming the decision of the appeal tribunal. (R. 41-42.)

In its said special appearance and motion to quash service, and in the hearing upon said motion, and in its said petition for review, appellant seasonably claimed that said Chapter 127 of the Laws of Washington of 1893, and partic-



ularly Paragraph 9 of Section 7 of said Chapter 127 (p. 410) and Chapter 86 of the Laws of Washington of 1895, and particularly Section 1 of said Chapter 86 (p. 170) and Chapter 253 of said Session Laws of Washington of 1941, and particularly Section 11 of said Chapter 253 (page 994) deprived appellant of property without due process of law, as forbidden by Section 1 of Article 14 of the Amendments to the Constitution of the United States, and that said Chapter 214 of the Session Laws of Washington of 1939, and particularly Paragraph (g) (1) of Section 16 of said Chapter 214, (page 856) and said Chapter 253 of the Laws of Washington of 1941, and particularly Sections 4, 5, 11 and 14 of said Chapter 253 (pp. 881, 884, 904, 915) were invalid because beyond the power of the State of Washington to enact, for the reason that the same constituted a regulation of and burden upon interstate commerce, and the interstate commerce of appellant, by the State of Washington, which is prohibited by Section 8 of Article I of the Constitution of the United States, and were invalid for the further reason that they were in violation of and repugnant to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, because they deprive appellant and citizens of the United States of property without due process of law (R. 45.)

An appeal was taken on March 6, 1943 by appellant from the decision of the Commissioner to the Superior Court of the State of Washington for King County (R. 43-45), which thereafter, on November 10, 1943, entered judgment affirming the decision of the Commissioner (R. 46-47).

In its appeal to the Superior Court the appellant seasonably claimed that said Chapter 127 of the Laws of Washington of 1893, and particularly Paragraph 9 of Section 7 of said Chapter 127 (p. 410) and Chapter 86 of the Laws of Washington of 1895, and particularly Section 1 of said

Chapter 86 (p. 170) and Chapter 253 of said Session Laws of Washington of 1941, and particularly Section 11 of said Chapter 253 (p. 904) deprived appellant of property without due process of law, as forbidden by Section 1 of Article 14 of the Amendments to the Constitution of the United States, and that said Chapter 214 of the Session Laws of Washington of 1939, and particularly Paragraph (g) (1) of Section 16 of said Chapter 214 (p. 856) and said Chapter 253 of the Laws of 1941 and particularly Sections 4, 5, 11 and 14 of said Chapter 253 (pp. 881, 884, 904, 915) were invalid because beyond the power of the State of Washington to enact, for the reason that the same constituted a regulation of and burden upon interstate commerce, and the interstate commerce of appellant, by the State of Washington, which is prohibited by Section 8 of Article I of the Constitution of the United States, and were invalid for the further reason that they were in violation of and repugnant to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, because they deprive appellant and citizens of the United States of property without due process of law (R. 43-45).

By its judgment of November 10, 1943, the said Superior Court of the State of Washington found that appellant was indebted to the State of Washington, and to the respondents, in the sum of \$3159.24, for contributions to the Unemployment Compensation Fund of the State of Washington, and held that said Chapter 127 of the Laws of Washington of 1893, and particularly Paragraph 9 of Section 7 of said Chapter 127 (p. 410) and Chapter 86 of the Laws of Washington of 1895, and particularly Section 1 of said Chapter 86 (p. 170), and Chapter 253 of said Session Laws of Washington of 1941, and particularly Section 11 of said Chapter 253 (p. 904), did not deprive appellant or citizens of the United States of property without due process of law as

forbidden by Section 1 of Article 14 of the Amendments to the Constitution of the United States; and that said Chapter 214 of the Session Laws of Washington of 1939, and particularly Paragraph (g) (1) of Section 15 of said Chapter 214 (p. 856), and said Chapter 253 of the Laws of Washington of 1941, and particularly Sections 4, 5, 11 and 14 of said Chapter 253 (pp. 881, 884, 904, 915) were not invalid as an invasion of the power of Congress to regulate interstate commerce and did not create a burden upon interstate commerce, and upon the interstate commerce of appellant, as prohibited by Section 8 of Article I of the Constitution of the United States, and did not deprive appellant and citizens of the United States of property without due process of law in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States (R. 46-47).

Thereupon appellant on November 23, 1943, appealed from the judgment of said Superior Court for King County, Washington, to the Supreme Court of the State of Washington, in accordance with the provisions of Chapter 61 of the Session Laws of Washington of 1893, page 119, *et seq.*, and the provisions of Sec. 11 of said Chapter 253 of the Session Laws of Washington of 1941, p. 904 (R. 48-51).

In its appeal to the Supreme Court of the State of Washington appellant seasonably claimed before said Supreme Court that said Chapter 127 of the Laws of Washington of 1893, and particularly Paragraph 9 of Section 7 of said Chapter 127 (p. 410) and Chapter 86 of the Laws of Washington of 1895, and particularly Section 1 of said Chapter 86 (p. 170) and Chapter 253 of said Session Laws of Washington of 1941, and particularly Section 11 of said Chapter 253 (p. 904) deprived appellant of property without due process of law, as forbidden by Section 1 of Article 14 of the Amendments to the Constitution of the United States,

and that said Chapter 214 of the Session Laws of Washington of 1939, and particularly Paragraph (g) (1) of Section 16 of said Chapter 214 (p. 856) and said Chapter 253 of the Laws of Washington of 1941, and particularly Sections 4, 5, 11 and 14 of said Chapter 253 (pp. 881, 884, 904, 915) were invalid, because beyond the power of the State of Washington to enact, for the reason they constituted a regulation of and burden upon interstate commerce, and the interstate commerce of appellant, by the State of Washington, which is prohibited by Section 8 of Article I of the Constitution of the United States, and were invalid for the further reason that they were in violation of and repugnant to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, because they deprive appellant and citizens of the United States of property without due process of law (R. 52).

In its opening brief (p. 11) appellant set forth in its assignments of error:

"1. The court erred in finding that appellant was doing business in Washington so as to be subject to process.

2. The court erred in finding that E. S. Alley had sufficient capacity to represent appellant so that service of process could be made upon him for it.

3. The court erred in finding that the Unemployment Commissioner had jurisdiction to levy an assessment against appellant for contribution to the unemployment compensation fund" (R. 52).

and on page 26 of its opening brief appellant stated:

"Article I, Section 8 of the Constitution of the United States provides:

"The Congress shall have power . . . to regulate commerce . . . among the several states."

### The Fourteenth Amendment:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, . . . " (R. 52.)

On January 4, 1945, the Supreme Court of the State of Washington, sitting en banc, rendered its en banc decision (122 Wash. Dec. 135) a copy of which is hereto attached, and on February 6, 1945, appellant's petition for rehearing (filed Jan. 26, 1945, R. 106) was denied and judgment entered by said Supreme Court affirming said judgment of the said Superior Court for King County, Washington (R. 107-108). The Supreme Court of the State of Washington by its decision and judgment held that said Chapter 127 of the Laws of Washington of 1893, and particularly Paragraph 9 of Section 7 of said Chapter 127 (p. 410) and Chapter 86 of the Laws of Washington of 1895, and particularly Section 1 of said Chapter 86 (p. 170) and Chapter 253 of said Session Laws of Washington of 1941, and particularly Section 11 of said Chapter 253 (p. 904) did not deprive appellant or citizens of the United States of property without due process of law as forbidden by Section 1 of Article 14 of the Amendments to the Constitution of the United States. The Court stated in its en banc decision:

"While we are of the opinion that the regular and systematic solicitation of orders in this state by appellant's agents, resulting in a continuous flow of appellant's product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process by the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule." (R. 74) (122 Wash. Dec. 157.)

The Supreme Court of the State of Washington by its said decision and judgment also held that said Chapter 214



of the Session Laws of Washington of 1939, and particularly Paragraph (g) (1) of Section 16 of said Chapter 214 (p. 856) and said Chapter 253 of the Session Laws of Washington of 1941, and particularly Sections 4, 5, 11 and 14 of said Chapter 253 (pp. 881 et seq.) were not invalid as an invasion of the powers of Congress to regulate interstate commerce and did not create a burden upon interstate commerce, and upon the interstate commerce of appellant, as prohibited by Section 8 of Article I of the Constitution of the United States, and did not deprive appellant or citizens of the United States of property without due process of law in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

The Supreme Court stated in its en banc decision:

"The remaining question is whether or not the imposition upon appellant of liability for contributions to the Washington unemployment compensation fund is an unconstitutional burden upon interstate commerce." (R. 76) (122 Wash. Dec. 159)

"In conclusion, we are of the opinion, the unemployment compensation act does not impose a burden upon interstate commerce, in so far as the business of appellant is concerned." (R. 79) (122 Wash. Dec. 162)

Appellant filed its petition for rehearing in the Supreme Court of the State of Washington on the 26th day of January 1945 and the same was denied on the 6th day of February 1945. (R. 107)

In hearing and deciding the aforesaid appeal by the appellant from the assessment levied by the Department of Unemployment Compensation and Placement of the State of Washington, the Supreme Court of the State of Washington was acting in a judicial capacity rather than in an administrative or legislative capacity.

Appeals from orders and assessments of said Department are governed by Section 11, Chapter 253 of the Session Laws of 1941 (page 90A) (supra p. 7) of Washington.

Appeals generally to the Supreme Court of the State of Washington are governed by the Laws of 1893, page 119, et seq. Remington's Revised Statutes of Washington, 1932, Vol. 4, Section 1716, p. 10; Section 1737, p. 72; Section 1740, p. 74; Section 1741, p. 75.

The judgment of the Supreme Court of the State of Washington is that of the highest court in which, under the laws of the State of Washington, judgment in this case can be had. No further appeal is possible save to the Supreme Court of the United States; hence, the appeal is taken from "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had."

Constitution of the State of Washington, Article IV, Sections 1, 4 and 6. Remington's Revised Statutes of Washington, 1932, Vol. 1, pp. 422, 423, 428.

The power of review which the said Section 11, Chapter 253 of the Session Laws of 1941 confers upon the Supreme Court of the State of Washington is quite similar to that which the Supreme Court of the United States has held to be of "judicial" character in the cases of *Federal Radio Commission v. Nelson*, 289 U. S. 266, and *Public Service Commission of Porto Rico v. Havemeyer*, 296 U. S. 506. Consequently the Supreme Court of the United States may review the decree of the Supreme Court of the State of Washington in this case, the said decree having been rendered in a judicial proceeding.

## E

### Substantiality of Questions Involved

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substan-

tial Federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton v. Regents of University of California*, 293 U. S. 245, 258.

The issue raised by the appellant's contention that the Washington service of process statutes here in question violate the "due process" clause of the Fourteenth Amendment to the Constitution of the United States involves a problem which is general throughout the United States. The problem is as to when a foreign corporation is present within the State or its transactions in a state are such as to render it subject to local process of the state. In its decision in this case the Supreme Court of the State of Washington has extended the rule holding such a service of process to be valid beyond the limits of any rule announced by the Supreme Court of the United States. The question practically presented is whether a large volume of interstate business sent into the state by a foreign corporation, with little else, is sufficient to constitute doing business in the state within the meaning of state statutes which authorize suits against foreign corporations "doing business" in the state. Implicit in this question is the question of whether or not such statutes, when construed as meaning that a large volume of interstate business is "doing business" in the state, are in contravention of the due process clause of Section 1 of the Fourteenth Amendment to the Constitution. Furthermore, the question thus raised by the Washington statutes here in question has never been expressly passed upon by the Supreme Court of the United States. For these reasons, the appeal presents a substantial Federal question. *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 476; *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79.

The issues raised by the appellant's contention that the Washington statutes, which provide for the levying of as-

assessments for contributions to the unemployment compensation fund of the State upon foreign corporations not doing intrastate business in the State, create a burden upon interstate commerce, have also never been decided by the Supreme Court of the United States. Neither has the question been decided by the Supreme Court of the United States whether such a tax as the Unemployment Compensation contribution here sought to be assessed can legally be assessed against a foreign corporation which is not present in the state and does no intrastate business in the state. These questions are of importance to every foreign corporation which ships merchandise in interstate commerce to the State of Washington. They are also of importance to every state which has similar statutes. It is important to the State of Washington to know as promptly as possible whether or not it is correct in making such assessments against such foreign corporations. They are questions which are likely to be constantly recurring. A decision by the Supreme Court of the United States in this cause will remove grave uncertainty by deciding to what extent foreign corporations are liable to contributions to such a fund. *Perkins v. Pennsylvania*, 314 U. S. 586; *Frick v. Pennsylvania*, 268 U. S. 473; *Cleveland P. & A. R. R. Co. v. Pennsylvania*, 15 Wall. 300.

## F

### Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Timeliness of appeal. *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31; *Puget Sound Power & Light Co. v. King County*, 264 U. S. 22.

2. Jurisdiction to entertain an appeal from the decision of a state court sitting in review of a state unemployment compensation department. *Perkins v. Pennsylvania*, 314 U. S. 586; *Federal Radio Commission v. Nelson*, 289 U. S. 266; *Public Service Commission of Porto Rico v. Havemeyer*, 296 U. S. 506; *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92; *Northwestern Bell Telephone v. Nebraska Railway Commission*, 297 U. S. 471.

3. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute violates the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79; *Bank of America v. Whitney Central National Bank*, 261 U. S. 171; *International Harvester Co. v. Kentucky*, 234 U. S. 579.

4. Jurisdiction to entertain an appeal from the decision of a state court upon the ground that a state statute places a burden on interstate commerce in violation of Section 8 of Article I of the Constitution of the United States. *Perkins v. Pennsylvania*, 314 U. S. 586; *Cheney Bros. v. Massachusetts*, 246 U. S. 147; *Matson Navigation Co. v. State Board of Equalization of California*, 297 U. S. 441; *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325; *Puget Sound Stevedoring Co. v. Tax Commission of Washington*, 302 U. S. 90.

5. Jurisdiction to entertain an appeal from a state court because the question of whether or not the state statutes involved are repugnant to the United States Constitution was actually decided by the State Supreme Court. *Mallett v. North Carolina*, 181 U. S. 589; *Missouri, Kansas & Texas Ry. Co. v. Elliott*, 184 U. S. 530.

Therefore the appellant, International Shoe Company, respectfully submits that the Supreme Court of the United



States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code.

Respectfully submitted,

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LAWRENCE J. BERNARD,  
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## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

No. 29296 En Banc

INTERNATIONAL SHOE COMPANY, *Appellant*,

v.

THE STATE OF WASHINGTON, *Respondent*

Filed January 4, 1945

The proceedings involved in this action were commenced by the department of unemployment compensation and placement, hereinafter referred to as the department, to recover contributions claimed to be due from International Shoe Company, hereinafter referred to as appellant, for the period of January 1, 1937, through December 31, 1941. No contention is made by appellant that the amount of the contributions found to be due by the commissioner of unemployment compensation and placement and the superior court of King County was not correct, if appellant is liable for any contributions.

Notice of assessment was personally served upon Edward S. Alley, a salesman employed by appellant, in King County, Washington, on October 10, 1941. On October 18th, appellant appeared specially before the department and moved to quash the service upon Mr. Alley upon the following grounds: (1) That service of the notice of assessment upon Mr. Alley was not good service on appellant; (2) That appellant is a corporation, organized and existing under and by virtue of the laws of Delaware, and is not engaged in doing business within the state of Washington; that it has no agent or other person within this state upon whom service of process may be made; that it is doing only interstate business. (3) That appellant is not an employer and does not furnish employment within the state of Washington, within the meaning of those terms as defined by the unemployment compensation act.

Appellant requested a hearing, and pursuant to such request the matter came on for hearing before the appeal tribunal upon stipulated facts, supplemented by the testimony of Edward Alley. On January 23, 1943, the appeal tribunal rendered its decision, wherein it denied appellant's motion to quash and held the commissioner was authorized to recover from appellant for the period above mentioned contributions in the sum of \$3,159.24.

A petition was duly filed with the commissioner to review the decision of the appeal tribunal. The commissioner thereafter reviewed such decision, and on February 11, 1943, entered an order confirming the decision of the appeal tribunal.

An appeal was taken from the decision of the commissioner to the superior court for King County, which thereafter, on November 10, 1943, entered judgment affirming the decision of the commissioner. This appeal is from the judgment entered by the superior court, and as a basis for such appeal appellant assigns error upon the finding of the trial court that appellant was doing business in Washington so as to be subject to process; upon the finding that Edward S. Alley had sufficient capacity to represent appellant so that service of process could be made upon him; upon the finding that the commissioner had jurisdiction to levy an assessment for contributions to the unemployment compensation fund; and upon the entry of judgment against appellant.

While we do not believe the testimony of Mr. Alley adds anything to the stipulated facts, we mention his testimony because the record shows the facts to be considered were those stipulated, plus the testimony of Mr. Alley.

The pertinent facts may be stated as follows: Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri. Its principal business consists of the manufacture and sale of boots, shoes, and other footwear. It maintains places of business where manufacturing is carried on, and from which its merchandise is sold, in the states of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York, and New Hampshire. Its merchandise is sold in Washing-

tion through its several selling divisions or branches, the following branches being the only ones doing any sort of business with residents of the state of Washington: Roberts, Johnson & Rand, Peters, Friedman-Shelby and Specialty. So far as appears from the record, these branches seem to be no more than designated sales units to handle appellant's products.

Appellant has no place of business in this state. It makes no contracts either for sale or purchase in this state. It maintains no stock of merchandise in this state, and makes no deliveries of merchandise in intrastate commerce in this state.

In its business in the state of Washington for four years, 1937 through 1940, appellant employed from eleven to thirteen salesmen, all of whom resided in the state, and whose principal activity was the solicitation of orders for appellant's merchandise to be delivered in this state. Commissions paid to these salesmen for the four years indicate the volume and extent of business carried on by the salesmen for appellant. It is evident that this business did not consist of isolated transactions, but was a continuous course of business, the total commissions paid for 1937 being \$36,098.19, for 1938, \$32,075.63, for 1939, \$33,846.44, and for 1940, \$31,879.19, or a total for commissions for the four year period, \$133,899.45.

These salesmen are under the direct supervision and control of sales managers, the latter being located in St. Louis. Each salesman has a designated territory within the state. Salesmen have a sample line consisting of one shoe of a pair. These samples belong to appellant and are given to the salesmen to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings, and some maintain no permanent sample rooms but rent rooms in hotels or business buildings in the various cities in their territory. The expense of such rental is paid by the salesmen, and they are later reimbursed by appellant. The authority of the salesmen is limited to exhibiting to merchants who are probable buyers samples of merchandise for which they solicit orders, endeavoring to procure orders on prices and terms fixed by appellant.

If orders are obtained, the salesmen transmit them to appellant's office in St. Louis for acceptance or rejection. If the orders are accepted by appellant, the merchandise called for by such orders is shipped f.o.b. shipping point, from outside the state of Washington. No salesman has authority to bind appellant with any contract or to finally conclude any transaction in its behalf, nor can he make collections. Salesmen are not permitted to engage in an independently established trade, occupation, profession, or business of the same nature as is involved in their employment by appellant.

The only thing which it can be said Mr. Alley's testimony added to the stipulated facts may be gathered from his somewhat detailed account of the conventions held each year at St. Louis, which the salesmen are required to attend, their expenses being paid by appellant. From this testimony, it appears that a regular program is followed by appellant through this contact with its salesmen, to keep the company's business at a high level, to eliminate, so far as possible, difficulties arising in the particular territories, and to discuss the credit of Washington purchasers and customers with whom appellant is doing business. The company's business in this state is apparently discussed in great detail, and the salesmen are instructed as to the line of shoes they are to offer to the trade, the method of selling, and conditions of selling. They also receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade.

Rem. Supp. 1941, Sec. 9998-114c, provides:

"At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except that if the employer cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last known address by registered mail. . . ."



Rem. Rev. Stat., Sec. 226 (P. C. Sec. 8438), provides the manner of service of summons in civil actions. Subdivision 9 of Sec. 226 provides that, if the suit be against a foreign corporation doing business within this state, the summons shall be served by delivery of a copy thereof to *any agent, cashier, or secretary thereof.*

In the instant case, both methods of service provided for by Sec. 9998-114c, *supra*, were followed.

The principal question with which we are here concerned is whether or not appellant was doing business in the state of Washington so as to make it amenable to process of the courts of this state.

Before discussing some of the authorities dealing with the question last above stated, we desire to call attention to the fact that we shall first consider the specific question of whether or not appellant is so doing business within this state as to make it amenable to process by the courts of this state, and not whether it is so doing business as to require it, in certain instances, to pay the annual license fee required by our statutes, as was the case in *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133. It is true that in the cited case the court does not point out the distinction above made, but the facts upon which the opinion is based and the statutes cited clearly show that the court was there considering the question of whether or not Smith & Co., a foreign corporation, was so doing business within this state as to require it to plead and prove that it had paid the annual license fee required by the statute before it could bring an action in this state.

We are of the opinion the *Dickinson* case, *supra*, is not contrary to the conclusion we have reached on the question here presented, nor have we been cited to any case decided by this court which, in our opinion, is contrary to such conclusion, when the distinction above pointed out is kept in mind, a distinction which is clearly made in the leading and often cited case of *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, to which further reference will be made.

We have in several cases stated that the mere bringing of an action in this state by a foreign corporation, does not constitute doing business in this state so as to require such

corporation to pay an annual license fee. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505; *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133; *Alaska Pac. Nav. Co. v. Southwark Foundry & Machine Co.*, 104 Wash. 346; 176 Pac. 357; *Singmaster v. Hall*, 98 Wash. 134, 167 Pac. 136; *St. Anthony & Dakota Elevator Co. v. Turner*, 132 Wash. 419, 232 Pac. 288; *Procter & Gamble Co. v. King County*, 9 Wn. (2d) 655, 115 P. (2d) 962. In the case last cited, we stated:

“We have consistently held that statutes providing that no corporation shall commence any action in this state without alleging and proving that it has paid its annual license fee, refer only to corporations doing business within this state, and do not apply to a non-resident corporation simply bringing an action in this state, as that does not constitute doing business within this state. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505; *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133.”

The above cited cases are not in point from a factual standpoint, nor are they in point when the question to be considered is whether or not the foreign corporation was doing business in this state so as to be amenable to process.

Later in this opinion we shall deal with the question of whether or not the exaction of the payment required under the unemployment compensation act is an unlawful burden upon interstate commerce.

We here also desire to emphasize that in reaching the conclusion drawn on this first question, we have not alone considered the volume of business transacted, but we have considered all the facts stipulated.

We desire first to call attention to an article in volume 35 of Michigan Law Review, under the general heading “Comments,” on page 969. This article states the early theory as expressed by Justice Taney “that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created,” and some of the reasons why the several states have passed statutes providing for service

of process upon foreign corporations which are "doing business" within the state. The article further states:

"The factor of 'doing business' within a state was not recognized as establishing a new basis for jurisdiction but was explained upon the theory of consent. The reasoning was that since the state had the power to refuse admission of foreign corporations which were not agents of the Federal Government or corporations engaged in interstate commerce, the state could as an implied condition to the corporation's entering the state make a foreign corporation amenable to process there. The corporation's consent to the statutory condition was implied upon its entering the state. Later another theory, called the 'actual presence' theory, was developed. Under this theory it was said that if a corporation was 'doing business' in a state it must be present in that state. The use of these two fictional theories, which extended the law of natural persons to make it adaptable to corporations, is largely responsible for the confusion occurring in this field."

The article further refers to and discusses three leading cases on this question, namely, *Green v. Chicago B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 S. Ct. 595, which holds that the corporation was not "doing business" in Pennsylvania, and *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, 34 S. Ct. 944, and *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, which hold that the respective corporations were doing business in the state where process was served.

Typical of the early cases based upon the consent theory is *Lafayette Ins. Co. v. French*, 59 U. S. 404, 15 L. Ed. 340.

The corporate presence theory was apparently formulated by Mr. Justice Brandeis in the case of *Philadelphia & Reading R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710, 37 S. Ct. 280, in these words:

"A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such man-

ner and to such extent as to warrant the inference that it is *present there*." (Italics ours.)

In *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587, 38 S. Ct. 233, the following general rule was announced:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted."

In *State ex rel. Columbia Broadcasting Co. v. Superior Court*, 1 Wn. (2d) 379, 96 P. (2d) 248, we cited with approval the general rule as above stated, but in view of what was stated in this same case in 5 Wn. (2d) 711, 105 P. (2d) 70, the decision in 1 Wn. (2) cannot be considered as authority, other than as it expresses the opinion of the judges who signed that opinion.

The leading case on the question of what constitutes doing business within a state by a foreign corporation so as to justify the courts of that state in taking jurisdiction of complaints against it, is *International Harvester Co. v. Kentucky*, 234 U. S. 579, hereinbefore referred to. The case presented the question of the sufficiency of the service of process on an alleged agent of the Harvester Co. in a criminal proceeding in a county court of Kentucky in which an indictment had been returned against the Harvester Co. for an alleged violation of the anti-trust laws of Kentucky. It is conceded in the cited case that whether the person upon whom process was served was one designated by the law of Kentucky as an agent to receive summons on behalf of the company, was a question within the province of the court of appeals of Kentucky to finally determine. The court stated the first question to be determined was whether, under the circumstances shown in that case, the Harvester Co. was carrying on business in Kentucky in

such a manner as to justify the courts of that state in taking jurisdiction of complaints against it. The opinion states:

"For some purposes a corporation is deemed to be a resident of the State of its creation, but when a corporation of one State goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that State. The mere presence of an agent upon personal affairs does not carry the corporation into the Foreign State. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State. \* \* \* each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the State."

The facts upon which the court determined that the corporation was doing business in Kentucky were as follows:

"Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there.

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, *they may receive the money, or a check, or a draft for the same* but they do not have any authority to make any allowance or compromise any disputed claims. \* \* \* All contracts of sale must be made f.o.b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the



State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general agencies handling interstate business with the people of Kentucky.' ' (Italics ours.)

The opinion states:

"Upon this question the case is a close one, but upon the whole we agree with the conclusion reached by the Court of Appeals, that the Harvester Company was engaged in carrying on business in Kentucky. We place no stress upon the fact that the Harvester Company had previously been engaged in doing business in Kentucky and had withdrawn from that State for reasons of its own. \* \* \* *Here was a continuous course of business in the solicitation of orders which were sent to another State and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction.* The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the State in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the State." (Italics ours.)

We call attention at this point to the fact that while in the cited case the court stated the agents might receive payment in money, checks, or drafts, and might take notes of customers, payable at Kentucky banks, the court did not emphasize these latter facts in holding that the company was carrying on a *continuous course of business*.

The cited case distinguishes the case of *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 S. Ct. 595, often cited to sustain the contention that a foreign corporation is not doing business within a state where it appears that in substance such business consisted of nothing more than the solicitation of orders.

Some three years after the decision in the *International Harvester Co.* case, *supra*, Mr. Justice Day, who wrote the opinion in that case, wrote the opinion in the case of *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, *supra*. While we are of the opinion, from an examination of the cited case, that the decision might well have been sustained upon the theory that the authority of Irby, the agent of American Tobacco Co. upon whom service was attempted to be made, had been revoked prior to the time of such attempted service, yet the court, as disclosed by the opinion, did state that the American Tobacco Co. was selling goods in Louisiana to jobbers and sending its drummers into that state to solicit orders from the retail trade, to be turned over to the jobbers, the charges being made by the jobbers to the retailers. These agents were not domiciled in the state and did not have the right or authority to make sales on account of the defendant company, collect money, or extend credit for it. The court, after the statement hereinabove referred to relative to the attempted service on an unauthorized agent, further states:

“Upon the broader question, we agree with the District Court that the American Tobacco Company at the time of the attempted service was not doing business within the State of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its

duly authorized officers or agents present within the State or district where service is attempted. \* \* \*

"As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that State, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it."

The court, after referring to the *International Harvester* case, *supra*, held that the district court properly concluded that the attempted service on Irby should be quashed.

From the cited cases, we reach the conclusion that, while mere solicitation of business within a state by the agents of a foreign corporation does not constitute doing business so as to make the corporation amenable to process by the courts of that state, solicitation, together with certain other acts, will be sufficient to render the corporation subject to process. So our inquiry now is: What additional acts will be deemed sufficient for this purpose?

In 1917, Justice Cardozo (then judge of the New York court) wrote the often cited opinion in the case of *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915. The court sums up the facts in the cited case in the following words:

"In brief, the defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistants, and through these agencies systematically and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York.

"To do these things is to do business within this state in such a sense and in such a degree as to subject the corporation doing them to the jurisdiction of our courts."

It might be added that all orders secured through the New York office were subject to confirmation at the home

office in Pennsylvania. No person connected with the New York office had authority to receive payment for shipments of coal, or to receive or endorse checks. At the conclusion of a discussion of the *International Harvester* case, *supra*, the court stated:

"That case goes farther than we need to go to sustain the service here. It distinguishes *Green v. Chicago, B. & Q. Ry. Co.* (205 U. S. 530) where an agent in Pennsylvania solicited orders for railroad tickets which were sold, delivered and used in Illinois. *The orders did not result in a continuous course of shipments from Illinois to Pennsylvania. The activities of the ticket agent in Pennsylvania brought nothing into that state. In the case at bar, as in the International Harvester case, there has been a steady course of shipments from one state into the other. The business done in New York may be interstate business, but business it surely is.*" (Italics ours.)

The court further stated:

"In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is *not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here.* \* \* \* If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, *whether its business is interstate or local, it is within the jurisdiction of our courts.* \* \* \* *The nature and extent of business contemplated by licensing statutes is one thing.*

*The nature and extent of business requisite to satisfy the rules of private international law may be quite another thing.* \* \* \* Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the

business that must be done. *All that is requisite is that enough be done to enable us to say that the corporation is here.*" (Italics ours.)

The holding in the *Tauza* case may be boiled down to this: That where there is a systematic and regular solicitation of orders by an agent or agents of the corporation, resulting in a continuous shipment of goods into the state where the agents are operating, together with the maintenance of a permanent office in the state by the corporation, the corporation can be said to be doing business in that state so as to make it amenable to process by the courts of such state.

The cases dealing with the question here presented are multitudinous. While it is probably true that most of the cases which hold the corporation was doing business in the state so as to make it *amenable to process* have some slight activity on the part of the agent in addition to the solicitation of orders resulting in a continuous flow of the corporation's products into the state, yet it seems to us the basic fact upon which the courts have determined that the corporation was doing business was the regular and systematic solicitation of orders by the agent, resulting in the continuous flow of the corporation's products into the state by means of interstate carriers.

The following are typical cases holding that the corporation was doing business in the state where service was attempted to be made. From our discussion of these cases will appear what facts, in addition to mere solicitation, the courts considered in determining that the corporation was doing business in the state. It will also appear from some of the decisions that a regular and systematic course of solicitation of orders by the agent of the corporation, resulting in a continuous flow of the corporation's products into the state, should be and is sufficient to warrant the court in holding the corporation was doing business in the state. Many of these cases cite and rely upon the *International Harvester* case. *Lamont v. Moss Cigar Co.*, 218 Ill. App. 435; *Hormel & Co. v. Ackman*, 117 Fla. 419, 158 So. 171, where in addition to soliciting orders the agent



made some collections; *Wheeler v. Boyer Fire Apparatus Co.*, 63 N. D. 403, 248 N. W. 521, where the agent's authority consisted in "soliciting orders and making collections (this case refers to and quotes from the *International Harvester* case, *supra*, *Tauza v. Susquehanna Coal Co.*, *supra*, and *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, of which more will be said later); *Dobson v. Maytag Sales Corp.*, 292 Mich. 107, 290 N. W. 346; *International Shoe Co. v. Lovejoy*, 219 Iowa 204, 257 N. W. 576, wherein the court stated:

"It appears from the foregoing recital of the facts that, in addition to the solicitation of orders from customers for shoes, Sommerhauser sought to induce Büttenhöff and others to engage in the shoe business. This appears to have been a part of his duties as a salesman. He was authorized to receive checks in payment of accounts and to transmit the same to petitioner; but not to cash the same or to receive money. Petitioner did not, in a general sense at least, maintain an office or place of business in this state. It did, however, permanently maintain a sample or display room in a hotel in Des Moines which was visited by actual or prospective customers to whom sales of merchandise were made. This method of transacting the business amounted to something more than the mere solicitation of orders. The practice of aiding, if not inducing, others to establish stores and engage in the shoe business in this state, also amounted to more than the mere solicitation of orders."

In the case of *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, hereinbefore referred to, the defendant was a foreign corporation having its principal place of business in Kansas City, Missouri. The agent on whom service was made was a traveling salesman, with authority to solicit orders which were forwarded to the home office for acceptance. *He had no authority to accept orders, make contracts, receive payment of any kind, and maintained no office or permanent place of business within the state of Iowa.* The defendant furnished him

with an automobile and paid the expenses of its operation. The agent resided in Des Moines and frequently sought retail customers to patronize the dealers to whom he made sales. The court, in reaching its decision that the corporation was doing business in Iowa, relied principally upon the *Tauza* and the *International Harvester* cases, *supra*. After quoting from the latter case, the court stated:

"The continuous course of business referred to was the solicitation of orders, which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. The court said, 'This was a course of business,—not a single transaction.' It is true that the above language is followed by a reference to the fact that the agents were authorized to receive notes, drafts, checks, money, etc., and transmit the same to the Harvester Company. Such transactions were, however, merely formal acts, and involved the exercise of no discretion on the part of the agent, and were always referable to transactions closed by the approval of the order, and, no doubt, generally by the delivery of the machines. *These transactions are not given significance in what the court terms a continuous course of business.*" (Italics ours.)

It is apparent that the Iowa court was of the opinion the court in the *International Harvester* case attached no particular importance to the fact that the agent was authorized to receive notes, checks, drafts, etc. This is evident from the concluding words in the opinion of the *Shankland* case:

"We recognize that the question is by no means free from difficulty; but it seems to us that the facts disclosed by the record establish that petitioner was, and has been for many years, engaged in a *systematic and continuous course of business* in the solicitation of orders and the delivery and shipment of merchandise to numerous customers, new and long established, and that such conduct constitutes doing business in this

state within the meaning of that term as used in Section 11072 and as construed and interpreted by the decisions of the Supreme Court of the United States. If the corporation was doing business in this state, it will hardly be questioned that Killingsworth (the agent) was a proper person upon whom service might be had." (Italics ours.)

The case of *West Pub. Co. v. Superior Court*, 20 Cal. (2d) 720, 128 P. (2d) 777, is, in our opinion, a well considered case. Many cases are cited, among them *Green v. Chicago, B. & Q. R. Co.*, *supra*, and *People's Tobacco Co. v. American Tobacco Co.*, *supra*, often cited to sustain the contention that a foreign corporation is not doing business in the state where service of process was attempted to be made. It also cites, and to a great extent relies on, the *Tauza* and *International Harvester* cases, *supra*, and recognizes that the adjudicated cases since the *International Harvester* decision have not been in complete agreement as to the precise factors additional to mere solicitation which motivated the court in the *Harvester* case to sustain the jurisdiction of the Kentucky court. The case goes on to say that, while the decision in *People's Tobacco Co. v. American Tobacco Co.*, *supra*, seems to have stressed the fact that the agents in the *Harvester* case were authorized to receive payments in Kentucky, other leading authorities have viewed the quantity and continuity of the solicitation of business in Kentucky as the controlling factor of the decision, rather than the mere additional circumstances of collecting money; citing, as sustaining this latter theory, *Tauza v. Susquehanna Coal Co.*, *supra*, and *American Asphalt Roof Corp. v. Shankland*, *supra*.

A good discussion of the question here presented will be found in *Dahl v. Collette*, 202 Minn. 544, 279 N. W. 561; where practically all the leading cases decided up to that time (April, 1938) are cited and discussed. We quote from the cited case:

"Courts are agreed that solicitation, if the only evidence of the visitation of a foreign corporation, will not warrant a finding that the corporation is doing

business so as to be subject to process. (Citing among other authority *Green v. C. B. & Q. Ry.*, *supra*.) This is not to say that solicitation, regularly and systematically conducted, within the jurisdiction is without import in deciding whether the corporation is doing business therein. Its simple meaning is that solicitation alone without other corroborating circumstances is not of sufficient strength to sustain the inference that the corporation is present. \* \* \* Solicitation aided by further manifestations of corporate presence no one of which is singly capable of carrying the weight of the inference will warrant the conclusion that it is doing business here. \* \* \*

"Solicitation in regular course of business, together with acceptance and performance of the contract within the state, will give ample ground for the conclusion of corporate presence. \* \* \* Or if the solicitation results in a continuous flow of goods into the state and if payment therefor is made within the state, these factors altogether support the inference that the corporation is present doing business. \* \* \* *It has also been held that if regular and systematic solicitation concurs with a continuous flow of goods into the state the inference is permissible.* \* \* \* Solicitation joined with adjustment of complaints as a part of the ordinary course of business also sustains the inference. \* \* \* The substance of the cases seems to be that although the rule against the sufficiency of solicitation alone still persists, 'it readily yields to *slight additions*.' " (Italics ours.)

The court then states that the facts show that:

"There was the solicitation of orders, which although not incessant in the sense that it was being conducted here at all times, yet was regular and systematic rather than incidental and haphazard. The volume of its products coming into the state as the direct result of this solicitation, while perhaps inconsiderable in relation to the total of its national business, was nevertheless substantial. The flow of its manufactures into the state

appears to have been constant and continuous. The compromise and adjustment of disputes with its customers appears also to have been habitually carried on here. Added to these circumstances is the fact of the maintenance of display and demonstration rooms at conventions attended by present and prospective customers under the management of an officer or agent of appellant. This occurrence is not of great weight, neither is it quite without significance.

"While it may be admitted that no one of the factors relied upon by respondents to demonstrate the corporate presence within the state of appellant is capable of sustaining that inference, and while the courts in some instances, as has been pointed out, are divided as to the sufficiency of any two of them, we are confident that their cumulative strength is ample to support the conclusion we reach that appellant was doing business and was therefore present within this state at the time service of the summonses and complaints was made on Collette as its agent."

The Wisconsin court in *In re Petition of Northfield Iron Co.*, 226 Wis. 487, 277 N. W. 168, places the same interpretation upon the *International Harvester* case as did the Iowa Court in the *Shunkland* case and the New York court in the *Tauza* case, saying:

"It is our conclusion that so far as the question of state power is concerned, the *International Harvester Co.* case, *supra*, must be taken to make valid a statute by a state providing for service upon the soliciting agent of a foreign corporation whose only activity aside from a solicitation of orders within the state is the filling of these orders through the instrumentality of interstate commerce."

In the case of *Harbich v. Hamilton-Brown Shoe Co.*, 1 F. Supp. 63, the Federal district court for the southern district of Texas had before it a set of facts very much like those in the instant case. In the cited case, service was made upon one Dan Smith, a salesman for the shoe com-



pany in the state of Texas. So far as the opinion indicates, Dan Smith had authority only to solicit orders, which he did in a regular and systematic way by appearing at customer's stores and offering samples for the customer's inspection. Smith had no authority on behalf of the shoe company to sell merchandise or otherwise bind the shoe company, but was solely a *soliciting agent*. The orders were taken subject to acceptance by the shoe company at its home office in St. Louis, Missouri. When the orders were accepted, the goods were shipped from outside of the state of Texas in interstate-commerce. The court held the shoe company was doing business in Texas, and that service on Smith was sufficient service on the company.

A very recent Federal case dealing with this question is *Frene v. Louisville Cement Co.*, 77 U. S. App. D. C. 129, 134 F. (2d) 511, decided January 25, 1943. In the cited case, the defendant Cement Co. was a Kentucky corporation, having its principal place of business at Louisville, Kentucky. It maintained no office or place of business in the District of Columbia. Its business was the manufacture and sale of cement and cement products. Lovewell, the agent upon whom service was had, resided in a suburb of Washington. His telephone number, which was displayed, together with his home address, his name and that of defendant, upon his business card, was listed in the Washington directory. Lovewell had authority to solicit orders for defendant's products, and his territory comprised all of Maryland, except the two western counties, the District of Columbia, and the eastern part of Virginia. He spent two-thirds or three-fourths of his time in Washington, which he said was "the biggest market in my territory." The volume of business done in Washington was large. Lovewell had no authority to conclude contracts or make binding sales. When he received orders, he forwarded them to the home office in Louisville, where they were accepted or rejected. Shipments on orders accepted were made in interstate commerce to building supply dealers in the vicinity of the job, who in turn supplied them to the contractors. Lovewell frequently visited jobs in course of construction where defendant's products were

being used, and on these occasions he would note the manner in which the products were being installed or used, and if any difficulties were being experienced, he would make suggestions as to how to overcome them. He would also go over any complaints and report them to the home office, but he had no authority to finally make adjustments or compromises. We quote from the opinion, which was written by Justice Rutledge, and which we think contains a sound criticism of the solicitation rule:

"The tradition has grown that personal jurisdiction of a foreign corporation cannot be acquired when the only basis is 'mere solicitation' of business within the borders of the forum's sovereignty. And this is true, whether the 'solicitation' is only casual or occasional or is regular, continuous and long continued.

"The tradition crystallized when it was thought that nothing less than concluding contracts could constitute 'doing business' by foreign corporation, an idea now well exploded. It is now recognized that maintaining many kinds of regular business activity constitute 'doing business' by foreign corporations, an idea withstanding they do not involve concluding contracts. In other words, *the fundamental principle underlying the 'doing business' concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities whether or not this includes the final stage of contracting.* . . .

"Furthermore, since the tradition crystallized, other developments in the law of personal jurisdiction have cast doubt upon its validity. These in general have expanded the scope of jurisdictional power over the persons of non-residents, including foreign corporations. It is still true, generally speaking, that mere casual and occasional acts do not furnish a sufficient basis for assertion of jurisdiction of the person in cases of nonresidents. But the nonresident motorists' statutes, which are applicable to foreign corporations, and the fact they have been so widely enacted and sustained, show two things among others. The first, like the cases sustaining jurisdiction upon a basis of 'solicitation' . . .

tation plus,' is that contracting, casually or continuously, is not essential for jurisdictional purposes, nor is negotiation, solicitation, or other activity looking toward the formation of contracts. The second is that some casual or even single acts done within the borders of the sovereignty may confer power to acquire jurisdiction of the person, provided there is also reasonable provision for giving notice of the suit in accordance with minimal due process requirements.

\* \* \* In general the trend has been toward a wider assertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up.

\* \* \* But when jurisdiction has been extended to include some types or kinds of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in 'mere solicitation' is, to say the least, anomalous. \* \* \* *Solicitation is the foundation of sales.* Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not 'doing business.' *The merchant or manufacturer considers these things the heart of business.* It is perfectly possible, under the 'mere solicitation' rule, for a foreign corporation to confine its entire market to a single jurisdiction, yet by carefully limiting its activities there to the soliciting phase, to force each of its customers having cause for legal redress to seek it in the foreign forum of incorporation. By careful segregation of the 'selling' phase in the place of market, a substantially complete immunity to liability, in the practical sense, could be created.

"It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a *regular, continuous and sustained course of business*, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. Although

the rule has not been clearly and expressly repudiated by the supreme court, its integrity has been much impaired by the decisions which sustain jurisdictions when *very little more* than 'mere solicitation' is done." (Italics ours.)

While it is apparent that the court was of the opinion that the mere solicitation rule should be abandoned when the soliciting activity is a *regular, continuous, and sustained course of business*, the court did not deem it necessary "to take the final step in repudiation in this case, since the facts are sufficient to bring it within the 'solicitation plus' rule."

Justice Edgerton, in a concurring opinion in the cited case, stated:

"It has been suggested that 'the existence of a jurisdiction to determine the personal liability of a corporation \* \* \* depends on the reasonableness of its exercise' and that 'if a foreign corporation voluntarily does business within the state it is bound by reasonable regulations of that business imposed by the state \* \* \* because it is as reasonable and just to subject the corporation to those regulations as though it had consented.' In the normal course of business appellee's agent induced appellants, in the District, to buy its product. They bought it in the District, for use in the District, from a District dealer to whom appellee had sold it. They used it in the District. The alleged defect appeared there and the alleged cause of action presumably arose there. Appellants appear to reside there. I think it is reasonable and just that they should be allowed to enforce their claim there."

We find a statement by this court in the case of *Macario v. Alaska Gastapeau Mining Co.*, 96 Wash. 458, 165 Pac. 73, quite in accord with the view expressed by Justice Edgerton:

"We think an examination of the authorities will show that the place of the arising of the cause of action has been generally regarded as of controlling force by the courts in determining the question of a defend-

ant foreign corporation being subject to the process of the court wherein recovery is sought, whenever the question of such foreign corporation doing business generally in the state in which it is sought to be sued is one of doubt."

In the case of *Grams v. Idaho Nat. Harvester Co.*, 105 Wash. 602, 178 Pac. 815, the court held that the defendant, an Idaho corporation, was doing business in this state and was amenable to process of the courts of this state. In addition to selling combined harvesting machines in this state, the company kept on hand, in a warehouse in this state, a large quantity of repair parts for the machines. Many of these articles were sold by the warehouse company as the property of the Harvester Co., the former accounting to the latter for all sales made.

In the case of *State ex rel. Kerr Glass Mfg. Corp. v. Superior Court*, 166 Wash. 41, 6 P. (2d) 368, we held that the solicitation of orders in this state by one Huch, a resident of this state, coupled with the fact that the Glass Co., a Nevada corporation, kept some of its goods in storage in this state, constituted doing business. Huch had no authority to accept orders, but all of the orders were taken subject to approval by the Glass Co. at its home office in Oklahoma. The Glass Co. completed delivery when the products were turned over to the transportation company in Oklahoma. Bills of lading, invoices, and statements were sent from the Glass Co. direct to the buyer. Remittances were made direct from buyer to seller. Huch made no collections and had nothing to do with extending credit.

Summing up the facts in the instant case, we find that the salesmen are all residents of the state of Washington, and have definitely defined territory assigned to them. There is no storage or warehousing of goods. The activities of these agents of appellant consist of the solicitation of orders and the display of samples, sometimes in permanent display rooms. Salesmen are required to spend certain time each year in St. Louis for the purpose of receiving direct personal instructions as to their duty, as to the line of shoes which they are to offer to the trade, the method



of selling, and information with reference to the construction of new types and kinds of shoes which are to be offered to the trade. Some of the salesmen rent sample rooms in business buildings, and the expense of such rental and maintenance is paid by the salesmen, who are reimbursed on an expense account by appellant. There is a detailed program followed by the company through contact with the salesmen, to keep the company's business at a high level, to eliminate differences arising in the particular territory, and to discuss credit of Washington purchasers and customers with whom the company is doing business. As a result of the activities of these agents, there is a continuous flow of appellant's product into this state by means of interstate carriers. This course of action has been carried on over a period of years, by as many as thirteen salesmen, and the substantial volume of merchandise and the regularity of its shipment are clearly shown by the amount of commissions regularly earned by these resident salesmen.

In the case of *Bankers' Holding Corp. v. Maybury*, 161 Wash. 681, 297 Pac. 740, this court adopted the following definition of business, as stated in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. Ed. 389, 31 S. Ct. 342:

““Business” is a very comprehensive term, and embraces everything about which a person can be employed. \* \* \* “That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.””

It seems to us, after a consideration of the facts in this case and the authorities bearing on the question here presented, that the conclusion that appellant, through its agents, was doing business in this state so as to make it amenable to process, is inescapable, whether we follow the “corporate presence theory” or base our decision on the reasonableness of permitting the corporation to be sued in this state rather than forcing respondent to go to Missouri or Delaware to bring its action.

While we are of the opinion that the regular and systematic solicitation of orders in this state by appellant's agents, resulting in a continuous flow of appellant's product

into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process of the courts of this state; we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule.

On this question, appellant cites and relies on *State ex rel. Paraffine Companies v. Wright*, 184 Wash. 69, 49 P. (2d) 929, and *Bank of America v. Whitney Bank*, 261 U. S. 171, 67 L. Ed. 594, 43 S. Ct. 311. In the former case, the cause came before this court on an application for a writ of mandate to compel the Thurston county superior court to transfer the cause to King County. The application of the Paraffine Co. was based upon the claim that it transacted no business in Thurston county, had no office there, and that there was no person residing in Thurston county upon whom process against it could be served. It appears that there was no person or company in Thurston county having the relationship of agent to the Paraffine Co. All purchases made by Olympia customers of the company were made at the Seattle office, where the principal place of business of the company was located. The customers of the Paraffine Co. in Olympia handling its products did so as independent merchants, and not as agents. The case is not in point.

The factual situation in the second case above cited is so different from that in the instant case that it cannot be considered helpful herein.

The second assignment of error in the case at bar is that Mr. Alley, upon whom service was made, was not such an agent as is contemplated by Rem. Rev. Stat., Sec. 226 (P. C. Sec. 8438). In view of the conclusion reached by us on the first question presented, we are of the opinion this question can be briefly disposed of.

The entire business of appellant in the state of Washington was carried on by Mr. Alley and other agents having like authority. Subsection 9 of Sec. 226 states that if the suit be against a foreign corporation doing business within this state, service may be made on "any agent."

We stated in *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161, that:

"The words of the statute 'any agent' were intended to have a broad meaning, and must be liberally con-

strued to effectuate the legislative intent. While they may not include a day laborer or an employee who has no authority to represent the corporation in any way other than to discharge his daily task, they must be held to include all such agents as represent the corporation in either a *general* or a *limited* capacity." (Italics ours.)

See also, *Pacific Typesetting Co. v. International Typographical Union*, 125 Wash. 273, 216 Pac. 358.

It is interesting to note, in view of what we have said on the first question and in the consideration of the second, that in the last cited case we quoted with approval the following statement found in *Beach v. Kerr Turbine Co.*, 243 Fed. 706:

"The tendency of legislation and of judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations. As was said by Mr. Justice Gray in *Barrow Steamship Co. v. Kane*, 170 U. S. 100, \* \* \* "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them." \* \* \*

On this question, we desire to again call attention to the following statement found in the case of *Tauza v. Susquehanna Coal Co.*, *supra*:

"It is not necessary to show that express authority to accept service was given to the defendant's agents. His appointment to act as agent within the state carried with it implied authority to exercise the powers which under our laws attach to his position. \* \* \* When a foreign corporation comes into this state, the legislature, by virtue of its control over the law of remedies, may define the agents of the corporation on whom process may be served. \* \* \* If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit \* \* \*. The corporation is here; it is here in the

person of an agent of its own selection; and service upon him is service upon his principal."

We do not deem further citation of authority necessary. We are of the opinion appellant's second assignment is without merit.

The remaining question is whether or not the imposition upon appellant of liability for contributions to the Washington unemployment-compensation fund is an unconstitutional burden upon interstate commerce.

We stated in *Bates v. McLeod*, 11 Wn. (2d) 648, 120 P. (2d) 472, that the contributions exacted under the unemployment compensation act constituted an excise tax upon the privilege of employing others. Employment is defined by Rem. Rev. Stat. (Sup.), Sec. 9998-119 (P. C. Sec. 6233-317) (g)(1), as follows:

"Employment," subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

It would seem that the act clearly contemplates that contributions shall be paid into the unemployment compensation fund for such employment as we have in this case. Assuming that appellant is engaged in interstate commerce by reason of the fact that its agents take orders in this state for goods to be shipped from another state, yet we are of the opinion that the contributions exacted by the unemployment compensation act from appellant do not constitute an unlawful burden on interstate commerce. Probably to meet such an argument as is made by appellant herein, and to permit the unemployment compensation acts of the several states to cover the largest possible range of employees, Congress passed the following statute:

"No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce and those en-

gaged in intrastate commerce." 26 U. S. C., Sec. 1616(a).

Appellant contends that it is not required, under the state law, to make payments to the unemployment fund. We see no merit in this contention. Appellant is a foreign corporation having in its employ for several years more than eight individuals in each of twenty different weeks, performing services for it within this state, and so, under the plain terms of the act, is required to make contributions to the unemployment compensation fund.

We are of the opinion Congress meant just what it said in the above quoted statute, and that appellant's objection to payment of contributions on this ground is not tenable. But even without the act of Congress above set out, we do not think appellant could avoid liability upon this ground. The cases cited by appellant are cases dealing with taxes imposed on doing business, and the imposition of such taxes on corporations doing business in interstate commerce would clearly tend to burden that commerce.

This court pointed out the distinction between such cases (tax on engaging or continuing within this state in any business) and the instant case, in *Paramount Pictures Dist. Co. v. Henneford*, 184 Wash. 376, 51 P. (2d) 385, where the court stated:

"It being an excise tax for the purpose of raising revenue, the act of the legislature imposing it was not passed in the exercise of the police power. Whether a law is enacted in the exercise of that power, depends upon whether the primary purpose is to raise revenue or to regulate industry."

In the instant case, the act under consideration was passed in the exercise of the police power for the purpose of relieving distress in this state resulting from involuntary unemployment.

In the case of *United Fruit Co. v. Department of Labor & Industry*, 344 Pa. 172, 25 A. (2d) 171, the Pennsylvania court held that the fruit company, engaged wholly in foreign commerce, with its principal office in Boston, but em-



ploying about three hundred persons within the state of Pennsylvania, was subject to the workmen's compensation act of Pennsylvania, although it required no authority from that state to carry on its business. The court then stated:

"The fact that an employe working within the State of Pennsylvania is engaged in interstate or foreign commerce does not necessarily take him outside the range of the Workmen's Compensation Act, which applies . . . to all accidents occurring within this Commonwealth." It is well settled that, in the absence of federal legislation on the subject, a state may, without violating the commerce clause of the federal institution, legislate concerning relative rights and duties of employers and employes while within its borders, although engaged in interstate commerce."

This view was sanctioned by the United States Supreme Court in *Valley S. S. Co. v. Wattawa*, 244 U. S. 202, 61 L. Ed. 1084, 37 S. Ct. 523. In the cited case, the steamship company was engaged in interstate commerce and contended that it was not liable under the Ohio workmen's compensation act. Answering this contention, Mr. Justice McReynolds, speaking for the court, said:

"We are asked to reverse the action of the Court of Appeals upon two grounds. First, because the company was engaged in interstate commerce and therefore could not be subjected to the Compensation Act without burdening such commerce contrary to the Commerce Clause of the Federal Constitution. . . .

"The first point relied upon is entirely without merit and inadequate to support our jurisdiction. In the absence of congressional legislation the settled general rule is that without violating the Commerce Clause the States may legislate concerning relative rights and duties of employers and employees while within their borders although engaged in interstate commerce."

In conclusion, we are of the opinion the unemployment compensation act does not impose a burden upon interstate

commerce, in so far as the business of appellant is concerned.

The judgment of the trial court is affirmed.

JEFFERS, J.

We concur: Beals, J.; Steinert, J.; Blake, J.; Robinson, J.; Mallery, J.; Grady, J.

SIMPSON, C. J. (dissenting):

As a member of this court, I feel impelled by a strong sense of duty to dissent from the able opinion prepared by the majority. I write this dissent prior to completion of its circulation among my fellow judges. I write it with a sincere hope that I may change the views of the writer and convince all of the judges that the majority opinion as now written is incorrect.

This case comes to us upon an agreed statement of facts, which reads:

"International Shoe Company is a Delaware corporation. It has its principal place of business in the City of St. Louis, Missouri. Its principal business consists of manufacture and sale of boots, shoes and other footwear. It maintains places of business where manufacturing is carried on and from which its merchandise is sold in the states of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York and New Hampshire. Its merchandise is sold through its several selling divisions or branches, the following branches being the only one doing any sort of business with residents of the State of Washington:

"Roberts, Johnson & Rand, Peters, Friedmann-Shelby, Specialty.

"It has not a place of business in the State of Washington; maintains no general agent in the State of Washington. It makes no contracts, either of sale or of purchase in the State of Washington. It maintains no stock of merchandise in the State of Washington and

make no deliveries of merchandise in intra state commerce in the State of Washington. \* \* \*

"The manner in which the business of International Shoe Company is carried on in the State of Washington, is generally as follows:

"Salesmen are employed from the head office at St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are required as part of their duties to spend certain time each year in St. Louis, Missouri for the purpose of receiving direct personal instructions as to their duties, as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling, and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and the expenses of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities to which they travel.

"Such transactions as the International Shoe Company has with persons in business, or who reside in the State of Washington, involving the sale and distribution of its merchandise to merchants in the State of Washington and are conducted as follows:

"Each salesman is given a designated territory in which to solicit orders. The authority of the salesman is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If orders are obtained, to transmit them to the office of the International Shoe Company

outside the State of Washington for acceptance or rejection, and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F.O.B., shipping point, from outside of the State of Washington. Practically all merchandise shipped by International Shoe Company into the State of Washington is on orders approved in St. Louis, Missouri and shipped therefrom. The merchandise which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which point collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salesman's duties and authority being limited strictly to the solicitation of orders.

"The salesmen are under the direct control and direction of the International Shoe Company and are not permitted to be engaged in an independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company.

"On October 10, 1941, a copy of Notice of Assessment by the Commissioner of Unemployment Compensation and Placement, was delivered to and left with one, E. S. Alley, a salesman of the International Shoe Company, at Seattle, Washington, demanding payment of delinquent contributions or interest, in the sum of \$6,000. Said sum was not arrived at by calculation of the wages earned by salesmen of the International Shoe Company within the State of Washington, but was an arbitrary figure set by the Commissioner. E. S. Alley is a salesman of the International Shoe Company, employed upon the terms and under the authority and for the purpose as hereinabove referred to for employees of International Shoe Company within the State of Washington. A copy of the same notice of assessment was also placed in the United States mails, postage fully prepaid, addressed to International Shoe Company at St. Louis, Missouri,

on the 10 day of October, 1941. Thereafter, and on the 18th day of October, 1941, International Shoe Company filed with the Department of Unemployment Compensation and Placement, its special appearance, motion to quash service and objection to jurisdiction."

The principal question is whether appellant is doing an intrastate business or is engaged in interstate commerce.

Involved in this question is the determination of whether the soliciting of business amounted to "doing business" so as to render the foreign corporation amenable to service of process.

The appellant was not properly served within the meaning of Rem. Rev. Stat., Sec. 226, which reads:

"The summons shall be served by delivering a copy thereof, as follows:— \* \* \*

"9. If the suit be against a foreign corporation \* \* \* doing business within this state, to any agent, cashier or secretary thereof; \* \* \*"

If at the time E. S. Alley, one of the salesmen mentioned in the stipulated statement of facts, was served with process, the company was doing an interstate business, of course our courts would have no jurisdiction, because the Federal government, under the provisions of subsection 3, of Sec. 8, Art. I of the constitution, has exclusive power "To regulate commerce with foreign nations and among the several states and with the Indian tribes."

This court is committed to the rule that corporations doing an interstate business cannot be held liable to our state laws. *Lilly-Brackett Co. v. Soxemann*, 50 Wash. 487, 97 Pac. 505; *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133; *Alaska Pac. Nav. Co. v. Southwark Foundry & Machine Co.*, 104 Wash. 346, 176; *Rawleigh Co., v. Harper*, 173 Wash. 233, 22 P. (2d) 665; *State ex rel. Paraffine Companies v. Wright*, 184 Wash. 69, 49 P. (2d) 929; *Brandtjen & Kluge v. Nanson*, 9 Wn. (2d) 362, 115 P. (2d) 731.

The phrase "doing business within this state" has been defined on many occasions. In *Smith & Co. v. Dickinson*, *supra*, the facts were that a foreign corporation manufactured merchandise in the state of Nebraska and sold some



of its products in this state. Its method of selling was that its representatives took orders here for the merchandise and forwarded those orders to the company at Omaha for approval or rejection. If the order was accepted, the goods were shipped from Omaha to the buyer in this state and sold on credit. The salesman had offices in Seattle and Spokane, at which places he retained exhibit samples belonging to the corporation and also made trips throughout the state for the purpose of selling the goods and at times paid the expenses of proposed customers from their homes to Seattle and Spokane. The agent did not have authority to complete sales, neither could he extend credit nor make collections. In addition, the record disclosed that the agent resold certain goods to other customers and at one time went so far as to sell some of his samples, the sale being closed through the office at Omaha. This court upheld the trial court's decision that the company was not doing business in the state of Washington.

The majority opinion passes the *Dickinson* case, *supra*, with the observation that it is not in point because it referred to the statute relating to the payment of a fee before an action could be instituted in the courts of this state.

We did not take that view of the case in *State ex rel. Paraffine Companies v. Wright*, *supra*.

Nor did the Federal courts so consider it in the cases of *Johanson v. Alaska Treadwell Gold Mining Co.*, 225 Fed. 270; *Zimmers v. Dodge Brothers*, 21 F. (2d) 152; and *Klabuba v. Southern Pac. Co.*, 33 F. (2d) 359.

The rule laid down in the foregoing case was approved in the following cases: *Macario v. Alaska Gastineau Mining Co.*, 96 Wash. 458, 165 Pac. 73; *Raeleigh Co. v. Harper*, *supra*; *State ex rel. Paraffine Companies v. Wright*, *supra*; *Brandtgen & Kluge v. Nanson*, *supra*; and *Procter & Gamble Co. v. King County*, 9 Wn. (2d) 655, 115 P. (2d) 962.

I call the attention of the students of this problem to the extensive citation of cases in 60 A.L.R., pages 1020 to 1030, inclusive. A reading of those cases brings forth the information that the principle announced in *Smith & Co. v. Dickinson*, *supra*, is approved by practically all the courts in the Union.

In another line of cases, we have considered the question of whether a corporation is doing business within a certain county. This proposition has arisen in those cases in which a corporation was sued and it contended that the court did not have jurisdiction within the provisions of Rem. Rev. Stat., Sec. 205-1 (P. C. Sec. 8542-1), which reads:

"An action may be brought in any county in which the defendant resides, or, if there be more than one defendant, where some one of the defendants resides at the time of the commencement of the action. For the purpose of this act, the residence of a corporation defendant shall be deemed to be in any county where the corporation transacts business or has an office for the transaction of business or transacted business at the time the cause of action arose or where any person resides upon whom process may be served upon the corporation, unless hereinafter otherwise provided."

In the following cases, this court has held that a corporation was not doing business in a county unless it transacted therein a part of its usual and ordinary business, which must be continuous in the sense that it is distinguished from merely casual or occasional transactions: *State ex rel. Wells Lbr. Co. v. Superior Court*, 113 Wash. 77, 193 Pac. 229; *State ex rel. American Sav. Bank & Trust Co. v. Superior Court*, 116 Wash. 122, 198 Pac. 744; *Alto v. Hartwood Lbr. Co.*, 135 Wash. 368, 237 Pac. 987; *State ex rel. Yakima Trust Co. v. Mills*, 140 Wash. 357, 249 Pac. 8; *State ex rel. Harrington v. Vincent*, 144 Wash. 246, 257 Pac. 849; *State ex rel. Kerr Glass Mfg. Corp. v. Superior Court*, 166 Wash. 41, 6 P. (2d) 368; *State ex rel. Hoffman v. Superior Court*, 168 Wash. 472, 12 P. (2d) 607; *State ex rel. Paraffine Companies v. Wright*, *supra*.

I call especial attention to the last state case cited, and shall discuss the Federal case later. In that case, the question presented was whether or not the Paraffine Companies was transacting business in Thurston county at the time its principal place of business was in King County. The facts were that the company sent salesmen throughout the state to call upon prospective purchasers and to obtain orders which were transmitted to Seattle.

In case the orders were approved by the credit department, the sales were made in the home office. No authority to bind the company to sales was given to the salesmen, and all orders were subject to approval. Deliveries were made either from the Seattle warehouse or the factory in California. The products were sold to three merchants of Olympia, two of whom were retail dealers. One of them, the Washington Veneer Company, was supplying other dealers. The salesmen accompanied representatives of the veneer company to various dealers in Thurston county. The dealers were told that the products of the Paraffine Companies would be handled by the local company, which would supply the dealers. The transactions were made in accordance with those statements. It appears that the veneer company ordered goods through the salesmen and made payments approximately every thirty days. This court held that the Paraffine Companies was not transacting business in Thurston county and, in so doing, stated:

"While the veneer company is referred to as a distributor, it purchases from the Paraffine Companies at a discount, in the course of trade, and resells to its own customers at a profit. The other two concerns purchase, in ordinary course, the products that are needed to supply their immediate customers: While the Paraffine Companies' salesmen stimulate trade and solicit the use of its products, purchases are made by the Olympia dealers at the Seattle office.

"We are clear that the Paraffine Companies is not transacting business within Thurston county, as the term has been defined by this court."

The decision was bottomed upon the *Dickinson* case, from which a liberal quotation was made.

I now call attention to a third series of cases in this state, some of which are not mentioned by the majority, which are directly in-point and decisive of the question presented in this case.

In *Rich v. Chicago, B. & Q. R. Co.*, 34 Wash. 14, 74 Pac. 1008, this court held that a railway company was not doing business in this state when it had an agent here who solicited passenger and freight traffic. In that case, we held that the

trial court's judgment quashing service upon the agent who solicited the business was correct.

In *Arrow Lbr. & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650, it was held that a railway company was not doing business in this state when it maintained an office in Seattle from which advertising matter of the company was distributed and freight and passenger business was solicited. It is true that the agent was paid by other companies, but it is equally true that tickets were sold which frequently were for passage over the defendant railroad company's lines.

In *Royce v. Chicago & N. W. R. Co.*, 90 Wash. 378, 156 Pac. 16, this court approved the action of the trial court in quashing service against a railroad company. Service was made against one who was advertised as the "general agent" of the defendant. The decision was based entirely upon *Arrow Lbr. & Shingle Co. v. Union Pac. R. Co.*, *supra*. In passing, the court stated:

"Considering the multitude of corporations and that, unlike individuals, they can be served through agents, all courts have shrunk from a rule which would soon swamp home tribunals with foreign brawls. Nor have we any desire, through the same rule, to expose our own incorporated merchants and carriers on like service to suits in every other state. Undoubtedly the universal opinion that solicitors for nonresident railroads and commercial houses are not agents for local service arises from these two apprehensions, and it was also foreseen to be unfair, as well as injurious to interstate commerce, to subject such principals to suits in our more than forty states, while the plaintiffs in most cases would be exposed to suit only at home."

In *Macario v. Alaska Gastineau Mining Co.*, *supra* this court determined that a mining company was not doing business in this state to an extent to give our courts jurisdiction over it. Its only business was to maintain an office in Seattle and an agent who was named "supply and forwarding agent" and whose duty it was to forward supplies to the company in Alaska. The agent also made hotel and

transportation reservations for officers and employees of the company who passed through Seattle on their way to Alaska. That agent had authority to make contracts of purchase when any considerable quantities had to be approved by his home office.

In *Alaska Pac. Nav. Co. v. Southwark Foundry & Machine Co.*, *supra*, it was held that a person was not an agent who was merely employed as a mechanical engineer of a foreign corporation for the purpose of installing a piece of machinery.

In *Walson v. Oregon Moline Plow Co.*, 113 Wash. 110, 193 Pac. 222, we held that a foreign corporation was not doing business in the state through an agent where the person who it was claimed was an agent was merely buying machinery from the foreign corporation and selling it here on his own account.

As I have mentioned, the Federal courts have passed upon this question.

In *Johanson v. Alaska Treadwell Gold Mining Co.*, *supra*, an attempt was made to sue a gold-mining company in the Federal court of this state. The defendant was a Minnesota corporation and had not complied with the laws of Washington authorizing it to do business here. It had general offices in Alaska and in San Francisco. It appeared further that its agent had purchased goods, wares, and merchandise in Seattle with direction that the same be shipped to the company at Treadwell, Alaska; that all such purchases were subject to the approval of the company; that the duties of the agent were to see that the goods were transported or forwarded from Seattle to Treadwell, Alaska; and that the agent did not pay for any goods or disburse any money. A motion was made to quash the service of summons made upon the agent in Seattle. The Federal court granted the motion and quashed the service, and in so doing, based its decision upon, and quoted from, the *Dickinson* case, *supra*.

In *Zimmers v. Dodge Brothers*, *supra*, the Federal court in Illinois had before it the question of what was doing



business in the state of Illinois. Referring to the facts in the case, the court set them out as follows:

"It is organized for, and does the business of, manufacturing, selling, and dealing in automobiles and automobile parts and accessories. Its principal office is Baltimore, Md. Its factories and principal place of business are located at Hamtramck, Mich., near Detroit, and that is the distributing center for the company's products. It does not have sales agents throughout the country, but sells to independent dealers, who in turn sell to associate dealers or other dealers, or directly to the ultimate purchasers or users. The relation between the company and the dealers is that of vendor and vendee. Dealers are appointed under a written 'dealer's agreement,' which becomes effective only upon execution by the company at Hamtramck after execution by the dealer. Dodge Brothers, Inc. grants to the dealer the right to purchase Dodge Brothers motor vehicles and parts for resale in a designated territory, but the manufacturer is not bound to deliver any specified quantity. The manufacturer delivers the motor vehicles and parts to the dealer, by delivering them to a common carrier at Hamtramck, Mich., and thereafter the dealer assume all the risk of loss and damage. The dealer pays for the motor vehicles and parts purchased, either in cash at the defendant's factory or on presentation of sight draft against bill of lading. Each dealer, at his own expense, maintains salesrooms for the purposes of exhibiting and selling the motor vehicles and parts.

"The defendant has in its employ 25 district representatives, located in 25 of the principal cities of the United States. One of the district representatives is located in Chicago and has an office here. His duties are to look after the interests of the defendant in the Chicago district and to make reports to the defendant from time to time; to investigate and interview men available as dealers and submit recommendations to the officials of the defendant corporation for final approval; to observe if subdealers get an adequate supply

of cars from dealers; to assist in settling disputes between dealers; to help the dealers with their sales and service problems; to stimulate sales contests among dealers; to advise the dealers in regard to their used car problems; to inform the dealers about methods of organizing; to talk to salesmen about problems of salesmanship; and to keep the defendant fully informed of conditions prevalent and events happening with respect to the industry in his district.

"He takes no active part in the sale of motor vehicles or parts; he has no authority to make contracts on behalf of the defendant corporation, nor has he done so; he maintains his office and makes all contracts, relating to the upkeep of his office, on his own behalf, and is reimbursed for his expenditures weekly by checks from Detroit, Mich.; his salary check is sent to him bimonthly from Detroit, Mich.; he takes the lease for office space in his own name; he keeps his bank account in his own name, without reference to his position as district representative; and his letter heads do not represent him to be an agent of Dodge Brothers, Inc."

"The district representative has no authority to commit the defendant finally in any way. He has a secretary, whose salary is paid by the company's check from Hamtramck. Persons inquiring at the office in Chicago with reference to service or purchase or exchange of Dodge Brothers automobiles are referred to the Dodge dealer in Chicago. This secretary compiles information from dealers and transmits such information to the company at Hamtramck."

The court held in that case that the facts did not show that the defendant corporation was doing business in the state of Illinois, and quashed the service of summons. In passing upon the question involved, the court cited *Rich v. Chicago, B. & Q. R. Co.*, *supra*, as sustaining authority.

*Klabzuba v. Southern Pac. Co.*, *supra*, is another case decided in the Federal court for western Washington. In that case, an action was commenced against a Kentucky corporation which was doing some business in this state.

but had not complied with our laws relative to foreign corporations doing business here. The facts show that the defendant was an interstate carrier by a railroad, but did not own any railroad in the state of Washington nor did it receive, carry, or deliver passengers or freight in this state. Service was made upon an employee of the company whose duty it was to solicit for passenger and freight traffic. The defendant maintained an office in the city of Seattle in charge of a representative who made the solicitations for passenger and freight traffic. It further appears that, when application was made, through tickets were issued from Seattle to outside points on the defendant's line by three railroad companies; that, to expedite the service, blocks of tickets were carried in stock by representatives of defendant and bore the name of one of the initial carriers, but not that of the company sued. Relative to the tickets, the facts show that they constituted a contract between the initial carrier and the passenger, the price being collected by the Southern Pacific; that thereafter an adjustment was made between that railroad company and the initial carrier; and that the defendant ultimately received from the initial carrier its share of the total purchase price.

The court referred to *Johanson v. Alaska Treadwell Gold Mining Co.*, *supra*, and held that the actions of the defendant company did not constitute doing business in the state within the purview of the law giving the court jurisdiction; and, in so doing, cited as its authority *Rich v. Chicago, B. & Q. R. Co.*, *supra*; *Arrow Lbr. & Shingle Co. v. Union Pac. R. Co.*, *supra*; *Royce v. Chicago & N. W. R. Co.*, *supra*; and *Macario v. Alaska Gastineau Mining Co.*, *supra*.

The first series of cases just discussed lays down a definite uniform rule which defines doing business within this state. The second series follows the reasoning of the first and announces a rule as to what constitutes doing business in a county.

The third series of cases announces the rule relative to what amounts to doing business in this state in order to subject a corporation to actions in the state. A study of these cases brings forth the information that one precise definition of the phrase has been applied and used by this and other courts in determining whether a corporation is

doing business within the meaning of Rem. Rev. Stat., Sec. 226 (P. C. Sec. 8438) (9); Rem. Rev. Stat., Sec. 205-1 (P. C. Sec. 8542-1); or Rem. Rev. Stat. (Sup.), Sec. 3826-2 (P. C. Sec. 4656-52).

We should adhere to established rules and principles so long as they do not indicate a palpable mistake or violate justice, reason and law. If we do find that some of our decisions violate the principles just mentioned, we should overrule those decisions and announce a new and proper rule.

In this state, we have one definition for negligence, one for contributory negligence, one for reasonable doubt, and one for proximate cause, including many other words and clauses, some used by lawyers and judges; and up until the present time, we have had one definition of what constitutes doing business in the state of Washington. I fail to see any reason for changing our rule and providing for two definitions of what is doing business within this state. The only purpose I can see is to give to the unemployment compensation commission a right not accorded to ordinary litigants.

I repeat, if the majority opinion prevails, we will have in this state two definite definitions of doing business which will confuse judges, lawyers, and laymen alike.

To show the baffling condition of our cases which will arise if the majority opinion prevails, I submit the following reasonable assumed situation:

Two actions are commenced upon the same day and filed in the superior court for Thurston county, one of them by John Doe Company against Smith & Company. The second is the state of Washington against the John Doe Company.

In the first complaint, the plaintiff alleges that, between the first day of June, 1943, and the 10th day of August, 1944, plaintiff sold and delivered to the defendant goods, wares and merchandise of the agreed value of one thousand dollars, which defendant refused to pay, though demand has been made therefor; that the plaintiff is a foreign corporation, has not filed its articles of incorporation with the secretary of state of the State of Washington, nor has it

paid its annual license fee to the State of Washington; that its business within this state is interstate business conducted in the following manner:

Plaintiff is an Illinois corporation having its business in the city of Chicago, where it manufactures washing machines and sells the same in various states of the Union, including the state of Washington. In the state of Washington its merchandise is sold through several selling divisions or branches in Spokane, Seattle, and Olympia. It maintains no general agent in the state of Washington and makes no contracts of sale in the state. It does not maintain a stock of merchandise in this state and makes no deliveries of merchandise herein. That the manner in which the business is conducted in the state of Washington is generally as follows:

Salesmen are employed from the Chicago office and work under the direct supervision and control of the sales managers in Chicago and are required as part of their duties to spend a certain portion of their time in Chicago for the purpose of receiving direct personal instructions as to their duties relative to the line of machines sold to the trade and the method of selling; further to receive information with reference to construction and new types and kinds of washing machines which are to be offered. The employees or salesmen are given a sample machine, but no sales are made of such samples, they being used for purposes of display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and expenses of the rental and maintenance are paid by them and they are then reimbursed on an expense account by plaintiff. Some salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the cities through which they travel. Each salesman is given a designated territory in which to solicit orders. The authority of each salesman is limited to exhibiting samples of the machines for which they solicit orders for the merchandise.

Salesmen endeavor to procure orders on prices and terms fixed by plaintiffs. If orders are obtained, they are transmitted to the office of plaintiff in Chicago, Illinois, for acceptance or rejection, and if orders are accepted by the plaintiff, the merchandise is shipped f.o.b. from shipping



points in the state of Washington. The merchandise which is shipped into Washington is invoiced at the point of shipment and the invoices are payable at point of shipment, from which point collections are made. The salesmen have no power or authority to bind plaintiff to any contract or to finally conclude any transaction in its behalf, their duties and authority being limited strictly to the solicitation of orders. It is further alleged that the salesmen are under the direct control and direction of plaintiff and are not permitted to engage in any independently established trade, occupation, profession, or business of the same nature involved in their employment by plaintiff.

The second complaint was filed by the state of Washington, seeking to collect taxes for unemployment compensation insurance from plaintiff. John Doe Company's salesman in Seattle or Olympia is served with complaint and summons, and the company then moves to quash the service on the ground that it is not doing business in this state, and bases its motion upon the allegations of the complaint which are identical with the allegations contained in plaintiff's complaint against Smith & Company except as to designation of individuals. Counsel, with the consent of the trial court, agree to argue the cases at the same time.

The trial court is faced with the answer to one question: What amounts to doing business in this state? The trial court then, in rendering its decision upon identical facts, must hold in the first case that plaintiff is not doing business in this state, and in the second case that the same individual is doing business in the state.

There are hundreds of cases written on the subject we have before us. However, it would serve no useful purpose to cite them in this opinion.

I shall content myself by calling attention to the cases cited by the majority. In so doing I will pay particular attention to the factual situations as compared with those in this case. I shall do this for the reason that each case must necessarily depend on its own facts. *St. Louis W. R. Co. of Texas v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, 33 S. Ct. 245.

In *Green v. Chicago, B. & Q. R. Co.* (1907), 205 U. S. 530, 51 L. Ed. 916, 27 S. Ct. 595, plaintiff brought an action

for personal injuries in the Federal Court for the eastern district of Pennsylvania. The action was against the Chicago, Burlington & Quincy Railway Company, incorporated in Iowa. The sole question presented in that case was the sufficiency of process for jurisdiction in the Federal court. The following facts were present:

The eastern point of the railroad was at Chicago, from which place its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers and the construction, maintenance and operation of the railroad for that purpose. According to the business methods generally pursued, freight and passenger traffic was solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this business, defendant employed one Heller, supplied an office for him in Philadelphia, designated him as "district freight and passenger agent," and in many ways advertised these facts to the public. The business of the agent consisted of soliciting and procuring passengers and freight to be transported over the defendant's line. In conducting this business, the company employed several clerks and various traveling passenger and freight agents, who reported to and acted under the direction of the agent. The agent could not sell tickets or receive payment for transportation of freight. When a prospective passenger desired a ticket, he applied to the agent, who took the applicant's name and procured a ticket from one of the railroads running west from Philadelphia. The ticket was on a prepaid order, and the applicant, upon arriving in Chicago, had a right to receive from the defendant company a ticket over that road. At various times, the agent sold tickets to railroad employees who had tickets over intermediate lines. In some cases, to suit the convenience of shippers who had received bills of lading from an initial line for goods routed over the defendant's lines, the agent gave in exchange therefor bills of lading over defendant's line. The bills of lading recited that they should not be in force until the freight had been actually received by defendant.

Touching the validity of the service upon the agent, the court said it depended upon

whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there."

The court further said:

"The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

The case has never been overruled, though in some cases it has been distinguished because of a different factual situation existing in the other cases. The rule announced in the above case has been followed by the United States Supreme Court eight times, by the Federal courts 112 times, and by the state courts 86 times. This court has adhered to the ruling in *Arrow Lbr. & Shingle Co. v. Union Pac. R. Co.*, *supra*.

Among the many cases upholding the rule just announced are: *St. Louis S. W. R. Co. of Texas v. Alexander* (1913), 227 U. S. 218, 57 L. Ed. 486; *International Harvester Co. v. Kentucky* (1914), 234 U. S. 579, 58 L. Ed. 1479; *Tyler Co. v. Ludlow-Saylor Wire Co.* (1915), 236 U. S. 723, 59 L. Ed. 808, 35 S. Ct. 458; *Peoples Tobacco Co. v. American Tobacco Co.* (1918), 246 U. S. 79, 62 L. Ed. 587; *Minnesota Commercial Men's Ass'n. v. Benn* (1923), 261 U. S. 140, 67 L. Ed. 573, 43 S. Ct. 293; and *Davis v. Farmers Co-op. Equity Co.* (1923), 262 U. S. 312, 67 L. Ed. 996, 43 S. Ct. 556.

In the *Harvester Co.* case, referred to by the majority as the leading case upon the subject, the facts were stated as follows:

"The Company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that State, but may reside there.

"Their authority must be limited to taking orders, and all orders must be taken subject to the approval

of the general agent outside of the State, and all goods must be shipped from outside of the State after the orders have been approved. *Travelers do not have authority to make a contract of any kind in the State of Kentucky. They merely take orders to be submitted to the general agent. If any one in Kentucky owes the Company a debt, they may receive the money, or a check, or a draft for the same but they do not have any authority to make any allowance or compromise any disputed claims.* When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general or collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f. o. b. from some point outside of Kentucky and the goods become the property of the purchaser when they are delivered to the carrier outside of the State. Notes for the purchase price may be taken and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that State, and they will be contracts governed by the laws of the various States in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts made by the general agent at Parkersburg, W. Va., will be West Virginia contracts." (Italics mine.)

It will be noticed that I have italicized more of the facts than the majority. I have done this because I contend that the court took notice of all of the facts in the case, including "If any one in Kentucky owes the Company a debt, they (travelers) may receive the money, or a check, or a draft for the same."

On page 587 of the opinion, the court re-emphasized the facts by stating:

*"In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and*



to take notes payable at banks in Kentucky." (Italics mine.)

The court upheld the *Green* case, but was of the opinion that it did not apply because the factual situation was entirely different.

The holding in the *Harvester Co.* case could not have been based entirely upon the continuous course or flow of business, because there was a continuous course of business conducted by the companies in both cases.

I call attention to the fact that the facts in the case at bar are like those in the *Green* case and entirely dissimilar to those present in the *Harvester Co.* case. The *Green* case is in point, and the latter case is not in point.

At this time, I desire to emphasize the point that this court has repudiated the continuous flow of business theory in *Brandtjen & Kluge v. Nanson*, *supra*. In passing upon the question of the effect that the number of transactions had upon the question of doing business in this state, we stated:

"The appellant seeks to distinguish the case of *Smith & Co. v. Dickinson* by saying that, in that case, there was only proof of 'isolated transactions' in this state. However, the opinion in that case shows on its face that the transactions of the plaintiff were no more isolated than were the transactions in this case. Whether a foreign corporation is doing business in this state does not depend upon the number of transactions that it has, but upon the nature and character of the transactions." (Italics mine.)

The majority stress the holding in *Fauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, in which it was held that a continuous flow of interstate business constituted doing business by a corporation in a state foreign to its place of organization. The writer of the opinion based his holding upon the *Harvester Co.* case, but failed to note the factual situation present in that case, which was that, in addition to soliciting business, the *Harvester Co.* employees made collections for their company.



The Supreme Court of the United States, in the *People's Tobacco Co.* case, adhered to this idea by saying:

"The plaintiff in error relies upon *International Harvester Co. v. Kentucky*, 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State."

The Federal courts in the following cases recognized that the holding in the *International Harvester Co.* case was grounded upon the fact that agents were doing business by making collections: *Hilton v. Northwestern Expanded Metal Co.*, 16 F. (2d) 821; *Cone v. New Britain Mach. Co.*, 20 F. (2d) 593; *Buffalo Batt & Felt Corp. v. Royal Mfg. Co.*, 27 F. (2d) 400; *Davega, Inc. v. Lincoln Furniture Mfg. Co.*, 29 F. (2d) 164. The facts and holding in the last case are so persuasive that I quote from them at length.

"(1) The defendant secured orders in New York through Shlivek for about \$200,000 of furniture per year;

"(2) The defendant sold in New York through Shlivek about \$1,000 of furniture per year, which had been shipped there for samples; Shlivek collected some overdue accounts.

"(3) The president and sales manager have come here 10 or 11 times a year, and while here have discussed business matters with Shlivek, and have also at times adjusted accounts with customers.

"(4) The sales manager, C. E. Lincoln, Jr., while in New York, arranged the contract for radio cabinets on which this action is brought, and has also solicited here other orders in radio cabinets."

"This is a very close case. The Supreme Court has said that the test of whether a foreign corporation is amenable to process depends upon whether 'it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.' *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. at page 265, 37 S. Ct. 280, 61 L. Ed. 710; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. at page 87, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537; *Rosenberg Co. v. Curtis Brown Co.*, 260 U. S. at page 517, 43 S. Ct. 171, 67 L. Ed. 372. This is a mere reiteration of the earlier statement by the same court that it 'has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction.' *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. at page 227, 33 S. Ct. 248, 57 L. Ed. 486.

"We are, in short, aided only by comparing those decisions in which the facts have been held to show the presence of corporations in foreign states, for the purpose of subjection to the jurisdiction, and the contrary. It has been definitely determined that the mere renting of an office and solicitation of business in the foreign state is insufficient to subject the corporation to service of process. *W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 236 U. S. 723, 35 S. Ct. 458, 59 L. Ed. 808; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537. Nor is the fact (if it be the fact, as is disputed) that the cause of action asserted here arose in New York material, unless the corporation was doing business in the sense that is required to subject it to jurisdiction. *Rosenberg Co. v. Curtis Brown Co.*, 260 U. S. at page 518, 43 S. Ct. 170, 67 L. Ed. 372.

"The plaintiff says that much more was done here than the solicitation of orders, and especially relies on *International Harvester v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. In that case the traveling

Salesmen of the harvester company did far more than to take orders to be accepted outside of the state. While it was generally provided, as in the present case, that 'all contracts of sale must be made f.o.b. from some point outside of Kentucky, and the goods become the property of the purchaser when they are delivered to the carrier outside of the state,' the agents were authorized to receive money, checks, or drafts from any one within the state who might owe the company and take notes of customers payable therein.

"Here Shlivek (the agent) was paid nothing for collecting accounts. He received no salary, but was only paid a commission based on the contracts which originated through him; and not on the amount realized. He did not receive payment for the furniture shipped from Virginia, or even have a record of the accounts. He occasionally adjusted disputes, subject to the approval of the home office, and procured payment of *overdue* indebtedness. The president and vice president of the corporation came into New York a few times a year, and made, or sought to make, adjustments; but, if occasional adjustments of accounts within the state are to be regarded as sufficient to subject a corporation to the jurisdiction, no foreign corporation can solicit business in any volume without becoming liable to service of process. Such a result seems a sufficient answer to the suggestion that the adjustment of disputes with customers strengthens the plaintiff's case. The situation is different from that in the *Harvester* case, where the course of business involved not collection of *overdue* accounts, but regular payment in the foreign state."

I can have no quarrel with the following cases cited by the majority, because in each of them the foreign corporation employed collectors in the state where they were working: *Lamont v. S. R. Moss Cigar Co.*, 218 Ill. App. 435; *Hormel & Co. v. Ackman*, 117 Fla. 419, 158 So. 471; *Wheeler v. Boyer Fire Apparatus Co.*, 63 N. D. 403, 248 N. W. 521; *International Shoe Co. v. Loveloy*, 219 Iowa 204, 257 N. W. 576; *Dobson v. Maytag Sales Corp.*, 292 Mich. 107, 290 N. W. 346.

In fact, the *Wheeler* case was based upon the entire holding in the *Harvester* case, from which we have quoted at length.

The case of *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862, 219 N. W. 28, was based upon the *Harvester Co.* and *Tauza* cases, and the writer of the opinion was guilty of the same sin of omission as the writer of the *Tauza* case in that he did not give full credit to all of the facts in the *Harvester Co.* case.

In all of the other cases mentioned by the majority are to be found facts similar to those in the *Harvester Co.* case in that the foreign corporation allows its agents to make collections or to do some other item of local business.

This is especially true of *West Pub. Co. v. Superior Court*, 20 Cal. (2d) 720, 128 P. (2d) 777, in which it appears that the salesmen accepted an initial payment upon books sold and helped collect delinquent accounts.

An exception is *Dahl v. Collette*, 202 Minn. 544, 279 N. W. 561, the writer of which case committed the same error charged in the *Tauza* case.

The case of *Harbich v. Hamilton-Brown Shoe Co.*, 1 F. Supp. 63, was decided upon the factual situation shown by affidavit. One of the affidavits indicated the following facts:

"After selecting the line of shoes that I desire for my trade, the sales agent then quotes me prices on these shoes and, if the prices are such that I conclude that I can use the shoes profitably, I accept his offer as quoted and direct him to ship me the shoes agreed upon, telling him the sizes that I desire for my trade and he transmits this order to the Hamilton-Brown Shoe Company and it delivers me the shoes in accordance with the trade I have made with its drummer or salesman."

*Frenc v. Louisville Cement Co.*, 134 F. (2d) 511, is not in point because the facts are entirely unlike those in the instant case. To show their difference, I quote as follows:

"However, it is admitted that he (Lovewell, the agent) frequently visits jobs in course of construction where the defendant's products are being used. On these occasions he would note the manner in which

the products were being installed or used and if any difficulties were being experienced, he would make suggestions as to how to overcome them; he would also go over any complaints with regard to the materials and report them to the home office. He had no authority finally to make adjustments or compromises. Lovewell called at the plaintiffs' house three or four times during the course of construction and 'half a dozen times' at another job then being done in the District for the Government. In connection with the latter, he took specimens of the work to government agents 'for testing purposes \* \* \* to have approval by the Government.' During these visits he inspected the work as it progressed, saw that the Brixment was properly mixed, was being properly spread, was being used as the defendant intended, and pointed out the values of different brick textures and bondings when used with Brixment. According to the plaintiff Leo Frene, Lovewell carefully looked over the plans and specifications for his house, 'visited the work regularly while in course of construction, and pointed out minor and major details to the brick-masons.' Frene also stated he knew 'of many other jobs where said Lovewell has not alone sold the Brixment, but has participated in and exhibited his engineering ability and fitness in order to promote and advance the general scheme of the work.'

"Lovewell testified that his employer 'told me to go on the job and see how they are progressing, how they like the material, how they are satisfied with it, and so forth' and 'the idea is to use my best judgment in promoting satisfactory use of this material.' The record further shows that Lovewell regularly secured information for his employer from various governmental agencies and departments, including the Bureau of Standards, the Procurement Division of the Treasury Department and the Government Printing Office. He admitted this work called upon 'his engineering ability and not his sales ability,' that it related in part to specific matters affecting his employer's work, such as



failure of its materials to pass government specification with resulting throwback by the contractor, and that the defendant would write instructing him to check up on the matter. He was useful also in securing more general information."

The above opinion contains a lengthy dissertation on the question of doing business. However, the essay has nothing to do with the factual situation present in the case nor with the applicable law. It is only an argument in favor of the so-called "modern trend."

A careful reading of the cases cited by the majority as upholding its contentions reveals that in only two of them, the *Tauza* and *Dahl* cases, do the facts coincide with those with which we are dealing.

It seems to me that the judgment should be reversed for two reasons: (1) that this court has at various times, upon facts alike to those present here, laid down a definite rule as to what constitutes doing business in this state, which rule is contrary to the one adopted by the majority; and (2) the cases from other jurisdictions have in fact announced rules contrary to those upon which the majority bases its holding.

I concur:

MILLARD, J.

Filed in Clerk's Office. Supreme Court State of Washington. Jan. 4, 1945. Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.



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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1345 107

INTERNATIONAL SHOE COMPANY, a Corporation,  
*Appellant,*

*vs.*

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT UPON APPELLEES' MOTION  
TO DISMISS OR AFFIRM

LEOPOLD M. STERN,  
T. M. ROYCE,  
JOHN L. SULLIVAN,  
LAWRENCE J. BERNARD,  
*Counsel for Appellant.*



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SUPREME COURT OF THE UNITED STATES  
OF AMERICA

OCTOBER TERM, 1944

No. 1345

INTERNATIONAL SHOE COMPANY, a Corporation,  
vs. Appellant,

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER, }  
Appellees.

APPELLANT'S BRIEF UPON APPELLEES' MOTION  
TO DISMISS OR AFFIRM

This is an appeal from the decision and judgment of the Supreme Court of the State of Washington (*International Shoe Company v. State of Washington, et.al.*, 122 Wash. Dec. 135).

That decision holds that it is not a burden upon interstate commerce, nor a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, to permit the State of Washington to recover, even under the facts presented in this case hereinafter referred to, contributions to the unemployment compensation fund of the State of Washington.

Although appellant is a corporation foreign to the State of Washington, the decision also holds that under the facts

in the case it is not violative of the Fourteenth Amendment to the Constitution of the United States to hold it subject to process of the courts of the State.

### **Summary of Facts**

The facts involved in this case are set out in detail in the Jurisdictional Statement. They are embodied in an agreed Statement of Facts, supplemented by testimony of one witness. As was stated by the lower court in its opinion, the testimony of this witness adds nothing to the agreed Statement of Facts. The facts as set forth in the agreed statement show:

Appellant is a corporation organized under the laws of Delaware, with its principal place of business in St. Louis, Missouri. Its business is the manufacture and sale of shoes. It has no place of business in the State of Washington, maintains no general agent in the State of Washington, makes no contracts of sale or purchase in that State, and maintains no stock of goods and makes no deliveries in intrastate commerce in that State. It employs solicitors to take orders in the State of Washington, these solicitors being residents of that State. All orders taken are subject to approval or rejection only at the home office of the Company outside of the State of Washington. If accepted, orders are filled f.o.b. shipping point outside of the State of Washington. All collections are made outside of the State of Washington. The solicitors have no authority to do anything except exhibit samples and solicit orders. The solicitors sometimes rent sample-rooms and are reimbursed for the expense thereof by the Company. As samples they carry one shoe of a pair, which belongs to the Company. The solicitors are paid upon a commission basis and the commissions amount to about \$33,000 a year in the aggregate, in the State of Washington.

The lower court summarized the facts as follows:

"Summing up the facts in the instant case, we find that the salesmen are all residents of the state of Washington, and have definitely defined territory assigned to them. There is no storage or warehousing of goods. The activities of these agents of appellant consist of the solicitation of orders and the display of samples, sometimes in permanent display rooms. Salesmen are required to spend certain time each year in St. Louis for the purpose of receiving direct personal instructions as to their duty, as to the line of shoes which they are to offer to the trade, the method of selling, and information with reference to the construction of new types and kinds of shoes which are to be offered to the trade. Some of the salesmen rent sample rooms in business buildings, and the expense of such rent and maintenance is paid by the salesmen, who are reimbursed on an expense account by appellant. There is a detailed program followed by the company through contact with the salesmen, to keep the company's business at a high level, to eliminate differences arising in the particular territory, and to discuss credit of Washington purchasers and customers with whom the company is doing business. As a result of the activities of these agents, there is a continuous flow of appellant's product into this state by means of interstate carriers. This course of action has been carried on over a period of years, by as many as thirteen salesmen, and the substantial volume of merchandise and the regularity of its shipment are clearly shown by the amount of commissions regularly earned by these resident salesmen."

**Jurisdiction to Review Ruling That Appellant Is Amenable to Process in the State of Washington.**

Appellees asserted that appellant is liable as an employer for the years 1937 to 1941, inclusive, for contributions to the unemployment compensation fund, under the pro-

visions of the state statute which are set out in the Jurisdictional Statement, and levied an assessment against appellant for contributions for those years.

The state statutes relating to process provide that levy of assessment of such contributions against an employer is made by serving upon the employer a notice of assessment, and, if the employer be a foreign corporation doing business within the State, by delivery of a copy of such notice to any agent, cashier or secretary of the corporation. (These statutes are set out in the Jurisdictional Statement.)

Service in this case was made by serving such a notice upon one of the solicitors.

Appellees have accompanied their Statement in Opposition to Jurisdiction with a motion to dismiss the appeal or to affirm the judgment of the lower court, upon the ground that the questions presented are not substantial.

The questions presented upon this appeal are: Whether appellant was doing business in the State of Washington so as to be amenable to process within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States; whether the levy of the tax constitutes a burden upon interstate commerce within the meaning of Section 8 of Article I of the Constitution of the United States; and whether it violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In its decision that appellant is subject to process of the courts of the State of Washington the Supreme Court of that State has extended the rule as laid down by this Court far beyond the limits of any case which has been decided by this Court. No case has been decided by this Court upon facts which show such limited activities in the state of the forum as are present in this case.



The extent of the rule announced by the lower court is shown by the following quotation from the majority opinion:

"While we are of the opinion that the regular and systematic solicitation of orders in this state by appellant's agents, resulting in a continuous flow of appellant's product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process of the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule."

The court does not point out what these "additional activities" are, and it is submitted that there are none.

So, the decision really holds that solicitation of orders by a foreign corporation, plus nothing more than a resulting continuous flow of goods into a State, constitutes doing business in that State.

Such a rule has never been announced by this Court.

Appellees cite

*International Harvester Co. v. Kentucky*, 234 U. S. 579.

That case does not support appellees because in that case, in addition to solicitation and flow of business into the State of the forum there was authority on the part of the traveling salesmen to receive payment in money, checks and drafts, on behalf of the defendant company, and to take notes payable and collectible in that State. No similar state of facts is present here.

The case of *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79; Ann. Cas. 1918C, 537, also cited by appellees, instead of supporting them supports the contention of appellant in this case. In that case the defendant company, a New Jersey corporation, sent its drummers

into Louisiana to solicit orders for the retail trade, to be turned over to jobbers. These drummers had no authority to make sales, collect money or extend credit for the defendant company. That case points out the distinction between it and the *Harvester* case in the following language:

"The plaintiff in error relies upon *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 53 U. S. (L. Ed.) 1479, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, *but there was also authority* upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; *these things, taken together*, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State.'" (Italics ours.)

That same distinction exists between the case at bar and the *Harvester* case. It is a distinction which the majority opinion of the lower court ignores.

In no case which this Court has decided has there been presented the question of whether solicitation of orders plus only a continuous flow of goods into a State resulting from the solicitation constitutes doing business in the State.

The confusion that exists in other courts as to the interpretation to be given the *Harvester* case is clearly shown by the multitudinous citation of authorities in the majority and dissenting opinions of the lower court in this case.

It is submitted that this case presents a substantial question warranting this Court entertaining jurisdiction to determine the right of the State of Washington to require appellant to submit to its process.

## **Jurisdiction to Review Ruling That State of Washington Has Right to Levy Unemployment Compensation Contribution**

Appellees rely upon the provisions of 26 U. S. C. Sec. 1606 (a), which reads as follows:

"No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce,"

as determining that appellant may be required to make contribution to the State of Washington unemployment compensation fund notwithstanding that it is a foreign corporation. In support of their position they cite *Perkins v. Pennsylvania*, 314 U. S. 586; 62 S. Ct. 484. However, that case presents no such factual situation as is present here. In the case at bar, appellant conducts no activities in the State of Washington save the solicitation of orders and shipment of goods into the State. The *Pennsylvania* case involves a natural person whose entire activities were carried on in the State of Pennsylvania. It is true that the case was decided as though he were engaged in interstate commerce, notwithstanding that the lower court pointed out that there was no factual situation presented which indicated that he was engaged in interstate commerce. *Commonwealth v. Perkins* 342 Pa. 529; 21 Atl. 2nd 45. The case was decided by this Court in a per curiam opinion.

Appellees also cite *Inter Island Steam Navigation Co. Ltd. v. Territory of Hawaii*, 305 U. S. 306. In that case the question involved was the right of the Territory of Hawaii to collect fees for expenses of investigation of utility cor-

porations, of which the Navigation Company was one. That company carried freight by water between different points in the Territory. Some of the freight was destined to foreign ports. Congress, in the exercise of its control over the legislation of territories, had passed a special act validating the Utilities Act of the territorial legislature which provided for the collection of fees to pay for the expenses of investigating corporations. That case can have no bearing on the decision of this case. All of the things done by the Navigation Company were done in the Territory of Hawaii.

Appellees also cite *Standard Dredging Corporation v. Murphy et al.*, 319 U. S. 306, 63 S. Ct. 1067, 87 L. Ed. 1017. In that case the employer was held liable for unemployment tax contributions. However, the facts in the case were widely variant from those in this case. In that case, the employer was present in the State of New York; it was engaged in the work of operating vessels in the waters of the State of New York during the entire period for which the tax was demanded. This Court said:

"The vessels which both employees served were engaged primarily on work in the waters of the State of New York during the tax period."

Moreover, there was not presented to the court in that case the question of whether such a tax violated the commerce or any other clause of the U. S. Constitution, excepting Article 3, Section 2, which gives to the Federal Courts exclusive admiralty jurisdiction. The only other question presented was whether the Acts of Congress had deprived the States of the right to tax maritime employers. In addition, there was no question in that case that the Dredging Company was present in the State with its property.

In the case at bar, as is shown by the facts detailed in the jurisdictional statement and summarized in this brief, appellant carried on no activities in the State of Washing-

ton excepting solicitation of orders, followed by the shipment of goods in filling the orders which were accepted, whereas in the cited cases the contracts of the employer and the work of the employer were completed in the State which demanded the contribution or the fee; also the property of the employer was located in that State. There has been no case decided by this Court which considers the question of whether an employer situated as is appellant here may, without violating the commerce clause of the Constitution be subjected to unemployment compensation tax.

It is submitted that the Federal statute referred to does not contemplate taxation of such a corporation. That statute has in contemplation only a situation such as is presented in the cases cited, namely where the corporation is present in the State, carrying on either interstate or intrastate activities: *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 69 L. Ed. 982.

To permit the State of Washington to levy this tax is also in violation of the due process clause of the Fourteenth Article of the Amendments to the Constitution of the United States.

In the case of *Frick v. Commonwealth of Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 66 L. Ed. 1058, this Court said:

"This precise question has not been presented to this court before, but there are many decisions dealing with cognate questions which point the way to its solution. These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra-territorial operation, . . .

. . . The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it



imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. *But to impose either tax the state must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law.*" (Italics ours)

In *Cleveland P. & A. R. R. Co. v. Commonwealth of Pennsylvania*, 15 Wall. 300, 21 L. Ed. 179, this Court said:

"The power of taxation, however vast in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects." (Italics ours)

It is respectfully submitted that this Court has jurisdiction to consider the questions of whether or not appellant is amenable to process of the State of Washington and whether or not it may be required to make contributions to the unemployment compensation fund of the State.

Respectfully submitted,

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CLERK

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 107.

INTERNATIONAL SHOE COMPANY, a Corporation,  
Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND REPLACEMENT and  
E. B. RILEY, Commissioner,  
Appellees.

Appeal from the Supreme Court of the State of Washington.

## APPELLANT'S BRIEF.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 107.

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INTERNATIONAL SHOE COMPANY, a Corporation,  
Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND REPLACEMENT and  
E. B. RILEY, Commissioner,  
Appellees.

---

Appeal from the Supreme Court of the State of Washington.

## APPELLANT'S BRIEF.

### INTRODUCTION.

This is an appeal from the decision and judgment of the Supreme Court of the State of Washington *en banc* finally entered by that Court on February 6, 1945 (R. p. 113). Probable jurisdiction was noted by this Court and the case was transferred to the Summary Docket on June 18, 1945, after Appellees had filed their Motion to Dismiss Appeal, Or In the Alternative To Affirm Judgment, and briefs thereon had been filed by both the Appellees and Appellant. In that connection this Court said that it "does not care to hear argument on the question whether the statutes attacked place an undue burden on interstate commerce" (R. p. 123).



## OPINIONS BELOW.

The opinion of Jeffers, J., concurred in by the majority of its Judges and adopted by the Supreme Court of Washington, and also that of its dissenting Chief Justice (Simpson, C. J.) concurred in by Justice Millard are officially reported under the style of *International Shoe Company v. State of Washington et al.*, 122 Wash. Dec. 135, and appear in the Transcript of Record at pages 59 ff. and 86 ff.

## JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended [Title 28, U. S. C. A., Sections 344 (a) and 861 (a)] providing for the review by the Supreme Court on appeal, where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

## STATEMENT.

The proceedings involved in this action were commenced by the State of Washington, Office of Unemployment Compensation and Placement and its Commissioner, E. B. Riley, the Appellees (herein called the "Department"), to assess the liability under statutes of the State of Washington (R. pp. 116-118 and Appendix hereto) for contributions claimed to be due from International Shoe Company as an Employment Unit having in its employ persons performing services for it within that State during the period January 1, 1937, through December 31, 1940. An order and notice of assessment against Appellant corporation (R. p. 1) was served by personal delivery to Edward S. Alley, a sales solicitor employed by Appellant in the State of Washington (R. p. 18). A copy of the notice of assessment was mailed by registered mail addressed to the Company in

St. Louis (R. p. 18). Appellant appeared specially before the Department and moved to quash the service of the notice upon Mr. Alley, objecting to the jurisdiction of the Department to levy the assessment (R. p. 4). As provided by the Washington practice (R. p. 2, *infra*, Appendix page v), a hearing was had before an appeal tribunal appointed by the Commissioner and at that hearing the cause was submitted upon a stipulation as to the facts in the case together with testimony by one witness.

From the agreed statement of facts it appears that the stipulation was made "for the purpose of presenting to the appeal examiner, and such other tribunals as this matter may come before on appeal or otherwise, questions raised in the proceeding by the Special Appearance, Motion to Quash Service and Objection to Jurisdiction filed by International Shoe Company" (R. p. 15). It was expressly agreed that the stipulation of facts should not constitute a general appearance by the International Shoe Company, but that it should at all times retain such rights as it may have under the special appearance referred to.

The following is a statement of the uncontroverted facts contained in the stipulation (R. pp. 6 to 23; incl.) as amplified by the testimony of Mr. Alley:

Appellant, International Shoe Company, a corporation organized and existing under the laws of the State of Delaware, had a principal office or place of business in St. Louis, Missouri, but no place of business in the State of Washington (R. p. 16). Its principal business consisted of the manufacture and sale of boots, shoes, and other footwear. It maintained places of business, where manufacturing was carried on and from which its merchandise was sold, in the States of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York, and New Hampshire. Its merchandise was sold through several selling divisions or branches, of which those dealing with

residents of the State of Washington were: "Roberts, Johnson & Rand," "Peters," "Friedman-Shelby," and "Specialty."

It maintained no general agent in the State of Washington. It made no contracts, either of sale or of purchase, in that State. It maintained no stock of merchandise there and made no deliveries of merchandise in intrastate commerce in that state (R. p. 16).

It employed from eleven to thirteen sales solicitors (herein and in the stipulation sometimes called "salesmen") residing and having their principal activities in the State of Washington, whose compensation was paid by Appellant in Missouri (R. pp. 16, 17, 19-22, incl.).

The salesmen were all employed from the head office at St. Louis and worked under the direct supervision and control of sales managers with offices in St. Louis; were required as part of their duties to spend certain time each year in St. Louis, Missouri, in order to receive direct personal instructions as to their duties and the lines, construction, and kinds of shoes which were to be offered to the trade (R. p. 16). The salesmen were given sample lines uniformly consisting of only one shoe of a pair. No sales were made by salesmen from such sample, they being merely used to display to prospective purchasers. Some of the salesmen maintained sample rooms in business buildings, paid the expenses of such rental, and were reimbursed on an expense account by Appellant. Others maintained no permanent sample rooms, but rented rooms in hotels or business buildings in the various cities through which they traveled (R. pp. 16, 17).

Transactions between Appellant and persons in business or resident in Washington were conducted as follows: Each salesman was given a designated territory in which to solicit orders. The authority of the salesman was limited to exhibiting to merchants who were prospective buyers, samples of the merchandise for which the salesmen solicited

orders; to endeavoring to procure orders on prices and terms fixed by Appellant; to transmitting to the office of Appellant outside of Washington, for acceptance or rejection, such orders as were obtained. On orders accepted, merchandise was shipped f. o. b. shipping point from outside of Washington—practically all from St. Louis, Missouri. The merchandise was invoiced at point of shipment and invoices were payable at point of shipment, from which point collections were made (R. p. 17).

No salesman had power or authority to bind the Company to any contract or finally to conclude any transaction in its behalf, the salesmen's duties and authority being limited strictly to the solicitation of orders (R. p. 17).

The testimony of Mr. Alley (R. pp. 11 to 14) merely confirmed the facts set forth in the stipulation that all the salesmen, during the period for which the assessment was made, attended instruction meetings or conventions in St. Louis, Missouri, at least once a year, and related in some detail the instruction given the salesmen at those meetings.

The appeal tribunal found the facts as set forth in the stipulation, but denied Appellant's Motion to Quash the original service and its objection to jurisdiction in the proceedings against it and held that the Commissioner was authorized to recover \$3,159.24 (R. pp. 23-35, incl.):

Appellant duly filed with the Commissioner of the Department a petition to review the decision of the appeal tribunal, and after such review the Commissioner entered an order confirming the decision of the appeal tribunal (R. pp. 37, 38).

Throughout the proceedings below Appellant, under its special appearance, consistently challenged the jurisdiction of the state officials to assess the tax and of the appellate tribunal and courts to sustain the assessment and tax, inter alia on the ground that the Commissioner had no jurisdiction over the corporation under the Washington statute properly construed, and also on the ground that the State

of Washington had no jurisdiction to impose the tax upon Appellant and that the statute is beyond the state's power if construed to apply to it (R. pp. 4, 9, 15, 40, 44, 54, 59, 109, 111, 115).

The statutes which the State claimed imposed or provided for the imposition of the tax upon Appellant are described in the Assignments of Error (R. p. 116) which challenge the validity, under the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, of the statutes as applied to Appellant. For the convenience of the Court the text of those statutes insofar as they are pertinent is set forth in the Appendix to this brief.

From the Commissioner's decision an appeal was taken to the Superior Court of the State of Washington for King County, which entered judgment against Appellant affirming the decision of the Commissioner, notwithstanding that in that appeal Appellant again seasonably claimed that the State of Washington was without jurisdiction to sustain the tax (R. pp. 39, 40).

Appellant then appealed to the Supreme Court of the State of Washington in accordance with the laws of that state, and there again seasonably claimed before that court that the statutes above mentioned as construed by the Commissioner and the lower court deprived Appellant of property without due process of law, contrary to the provisions of said Amendment to the Constitution of the United States (R. pp. 48, 54-59).

Thereafter the Supreme Court of the State of Washington, sitting *en banc*, rendered the decision from which this appeal was taken: By its decision the Supreme Court of the State of Washington ruled that the Washington statutes above mentioned did not deprive Appellant of property without due process, contrary to the United States Constitution, stating, "While we are of the opinion that the regular and systematic solicitation of orders in this



state by Appellant's agents, resulting in a continuous flow of Appellant's product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make Appellant amenable to process by the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule." The record shows no additional activities in the State other than those which were purely incidental to solicitation of orders by the salesmen.

### **SPECIFICATION OF ERRORS.**

Assignments of Error I, II, V, VII, that portion of VIII not relating to Section 8, Article I, of the Constitution, and IX (Record pages 116-118) are here relied upon.

Summarized, the Assignments of Error relied upon challenge:

(a) The validity of the taxing statutes as construed by the State Court and applied by the Commissioner to this Appellant, upon the ground that they violate the due process clause of the Fourteenth Amendment to the Constitution.

(b) The ruling of the State Court that the statutes in question, as construed by it and applied to Appellant, do not deprive Appellant of property without due process of law.

(c) The judgment of the State Court against Appellant for the tax under the conditions shown in the record as violative of the due process clause of the Fourteenth Amendment to the Constitution.

## **SUMMARY OF THE ARGUMENT.**

### **I.**

**The assessment of the tax was void for lack of jurisdiction.**

Distinction between jurisdiction as relates to suits and jurisdiction with respect to taxation.

A lesser degree of business activity is required to authorize service (for suits) than in other cases (as for taxation).

**A. Appellant was not doing such business in Washington as to manifest sufficient presence there to confer jurisdiction over it.**

1. Mere solicitation of orders does not confer jurisdiction for suit.

2. Application of facts in the case at bar to the above rule.

(a) The acts of solicitation were not such as to manifest presence.

(b) The flow of merchandise resulting from orders accepted outside Washington and shipped f. o. b. outside points into Washington pursuant to accepted orders is not activity of the shipper in that State—the carrier acts for the buyer.

(c) Such incidents of mere solicitation as display of samples in hotel or other sample rooms rented by agent are without significance on the question of Appellant's presence in the State.

**B. The person served did not have authority, express or implied, to receive or accept service.**

1. The duties and functions of H.S. Alley in acting for the corporation were limited to the solicitation of orders.

2. Service upon a person as to matters wholly unrelated to his duties is not service upon the corporation for which he solicits orders.

3. The validity of service on Mr. Alley is affected by his interest as a potential beneficiary of the tax.

**C. The rule of *Flexner v. Farson*.**

1. Substituted service on an agent of one whom a state cannot exclude is not due process.

2. Appellant's activities in Washington were such that that State lacked control of it. It could not and did not require either registration or appointment of a general agent for service.

3. The attempt to force Appellant to submit to Washington's jurisdiction through service on an order-taker violates due process as there was no right of removal to the Federal courts.

4. The doctrine of lack of jurisdiction when control is absent rests in the due process clause—not the commerce clause, as is demonstrated in cases involving matters at the time held not to be commerce.

## II.

**Jurisdiction to impose the tax was lacking.**

1. Appellant was not doing business in Washington and had no agent in that State for service of process.

2. Even if Appellant had had a resident agent authorized generally to receive service, it could not be subjected to this tax.

(a) Jurisdiction to impose an excise tax depends on granting of a legal privilege to the person taxed.

(b) This case involves a tax upon payment of wages for services.

(c) The payment of wages was not made in Washington and was not under the State's control.

---

## ARGUMENT.

### I. The Assessment of the Tax Was Void for Lack of Jurisdiction.

Section 14 (c) of the Unemployment Compensation Act, Rem. Rev. Stat. (1943 Suppl.), sec. 9998-114c (infra, Appendix page iv), provides that service of notice of delinquent assessment (which is necessary to assessment) shall be served upon the employer in the manner prescribed for the service of summons in civil actions. Rem. Rev. Stat., sec. 226 (P. C., sec. 8438), provides:

“The summons shall be served by delivering a copy thereof as follows: \* \* \* (9) If the suit be against a foreign corporation \* \* \* doing business within this state to any agent, cashier or secretary thereof; \* \* \*

Certain principles, then, are plain: first, that if Appellant was not doing business in the <sup>state</sup> State of Washington, then there was no jurisdiction to assess the tax in controversy, not only because the statute relied upon as authorizing service upon Appellant by its terms is inapplicable, but also because the requirements of the due process clause of the Fourteenth Amendment to the Federal Constitution invalidate such an assessment. (See Cases cited infra.) Second, that if Mr. E. S. Alley, to whom the notice of assessment was given (R. p. 18), was not an “agent” of Appellant within the sense in which that term is properly used in cases involving jurisdiction, there is no jurisdiction to assess the tax.

At the outset the issue should be clarified by the elimination of certain confusion which seems to have existed below. The issue in this case is not necessarily resolved or settled by the rules concerning the jurisdiction of a court over a non-resident corporation. If under such rules the Washington tribunals and courts had no juris-



diction over Appellant, of course, the judgment below violates due process. But it is entirely possible that without violation of rules concerning jurisdiction of courts, Washington statutes may give them jurisdiction over this foreign corporation in certain matters and still the State may not have jurisdiction to tax it. The question in this case is the jurisdiction of the State of Washington to impose and assess a tax. This is a very different question in principle from that involved in the general subject of jurisdiction of courts over non-resident corporations. For instance:

On the one hand the question of jurisdiction of courts is adjective to the law—a question whether or not a defendant must respond in a tribunal of a plaintiff's choice. In every such case the plaintiff has chosen for a good reason a particular jurisdiction—that in which he resides; that in which the injury was committed or damage suffered; that in which goods allegedly defective were delivered or used. *Davis, Director General of Railroads v. Farmers Cooperative Equity Co.* (1923), 262 U. S. 312, 67 L. Ed. 996. In every such case the question is what jurisdiction will enforce a liability created prior to the service of process questioned.

On the other hand the question of jurisdiction to make the tax assessment purportedly made herein has to do with the creation—the origin of an obligation, because assessment is a condition precedent to the liability. The question of jurisdiction to assess a tax is a question of substantive, not procedural law, for, lacking jurisdiction to assess in Washington, there is not power in any officer of that State to make an assessment elsewhere, and absent a valid assessment the obligation does not exist. Whether or not Missouri would enforce a **judgment** for taxes, it is clear that neither the Constitution nor general principles of comity require or permit Missouri to make an assessment of taxes in behalf of Washington. It is a question of

control. Power to assess a tax implies that the state has jurisdiction to license, to regulate, to exclude.

In *People ex rel. Manila El. R. R. & L. Co. v. Knapp* (1920), 229 N. Y. 502; 508, 128 N. E. 892, it was ruled:

"The condition of doing business in this state, within that intendment, implies that the foreign corporation is accomplishing acts and activities within the state which the state might reasonably and with ordinary interstate comity interdict or prevent, and the doing of which was a privilege which required governmental consent, supervision and control, and which necessitated or sought governmental opportunity and protection to be compensated or balanced by contributions, through taxation, to the burden of government."

See also: *Von Baumbach v. Sargent Land Co.* (1917), 242 U. S. 503, 61 L. Ed. 460.

In *Hartstein v. Seidenbach's, Inc.* (1927), 129 Misc. 687, 689, 222 N. Y. S. 404, it was said:

"\* \* \* a lesser degree of business activity is required to authorize service than in the other cases \* \* \* (as for taxation)."

Hence it follows that if the service in this case was not such as would support jurisdiction of a Washington court, it is *a fortiori* not such as would sustain an assessment; that the activities sufficient to sustain jurisdiction to assess are rather like those sufficient to sustain the requirement of a corporate license to do business than like those to sustain a court's jurisdiction. The proposition that Appellant could not be required to register in the State of Washington, as a foreign corporation engaged in business there, needs no argument (R. pp. 15-16).

**A. Appellant was not doing business in the State of Washington.**

It is well settled that to be doing business in a state, even to be sufficient to render a corporation subject to the jurisdiction of the courts of that state, the business must be such as to manifest the presence of the corporation in the state. *St. Louis Southwestern Ry. Co. v. Alexander* (1913), 227 U. S. 218, 57 L. Ed. 486. It is not sufficient that it carries on only interstate activities. It is true that a corporation cannot claim an exemption from state jurisdiction whether for suit or from taxes, merely because it can show that it is engaged solely in interstate commerce. *International Harvester Company v. Kentucky* (1913), 234 U. S. 579, 589, 58 L. Ed. 1479. But it does not follow, and has never been held that the converse is universally true and that all corporations engaged in interstate commerce activities in a state thereby become subject to the state's jurisdiction. On the contrary, in *People's Tobacco Company, Ltd., v. American Tobacco Company* (1917), 246 U. S. 79, 1 c. 86, 62 L. Ed. 587, this Court in an opinion delivered by Mr. Justice Day, from which there was no dissent, said of a corporation which was engaged in carrying on interstate commerce with Louisiana residents through mere solicitation:

"The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. (Citing cases.)

“ \* \* \* As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it. (Citing cases.) ”

And in that case this Court expressly distinguished it from *International Harvester Company v. Kentucky*, 234 U. S. 579, as follows:

“ The plaintiff in error relies upon *International Harvester Company v. Kentucky*, 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the state, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that state.”

The case at bar is one where Appellant's whole activity in the State of Washington, if it can be called an activity there, was to cause individuals to solicit orders for its merchandise. The solicitors transacted no business for it. Appellant did not assist them in Washington; they came to Missouri for instructions and samples to assist in procurement of orders. They were not authorized to consummate and did not consummate any sales.

These solicitors cannot be considered a part of Appellant so as to evidence its presence in the State. A retail shoe merchant or any other person could have sent an order for goods, or could have procured a stranger to do

it, with the same effect. Appellant would have accepted or rejected the order; if the order was accepted, it would have been filled. The solicitors of orders exercised no part of the charter functions of Appellant. Appellant is no more within the State of Washington than it would be if a newspaper carried solicitations for orders for its merchandise. But it would not be contended that service on the advertiser might be made on a daily newspaper, in which a foreign corporation advertised, or that such service would become valid if the result of the advertising was a flow of merchandise into the state through shipments made to the purchasers f. o. b. points outside the state. The resultant "continued flow of merchandise" into the state cannot be said to evidence any activity within the state on the part of the foreign corporation. Orders are accepted only outside of the State of Washington. They call for shipment f. o. b. points of shipment which are outside of that state. Consequently, when the goods are shipped as required, the sale is completed and the goods become the property of the purchaser. The carriage of the goods into the state in such a case is done for the buyer and not for the seller. The activities within the state connected with the "flowing of goods into the state" are therefore acts of the buyers and not activities of the seller within the State of Washington.

The only purported "activity other than solicitation" within the state therefore boils down to that of the display of samples by the solicitors in rooms rented for that purpose. That could be the only other activity which brought about a "solicitation plus" in the view of the majority of the Justices of the Supreme Court of Washington. It can be no more of an "other activity" than that of causing advertisements to be displayed in the newspapers of the state claiming jurisdiction, as was the case in *People's Tobacco Company v. American Tobacco Company*, 246 U. S. 79. The statement of this court that solicitation of orders alone



is not the kind of doing business which manifests the presence of a corporation in the state in such a way as to subject it to the local jurisdiction for service of process upon it, is meaningless if it is not applicable when the solicitation involves display of samples. If the renting by salesmen of sample rooms in business buildings is not to be regarded as a mere incident of the solicitation and without determinative significance, then the renting of a room by a traveling salesman in a hotel where he may sleep at night between solicitations, his checking of his personal baggage and his sample cases at hotels or at railroad stations, his eating at eating houses; and other necessary incidents of his being able to carry on solicitations for orders and for which he is reimbursed by the corporation, all become matters of "solicitation plus" so that, under the rule suggested and applied by the majority of the Washington Supreme Court, foreign corporations would always be amenable to process. We submit that the whole activity on the part of Appellant in the State of Washington, as shown by the record in this case, may properly be regarded as mere solicitation of orders insufficient to support jurisdiction to assess, or even to support process for a suit.

As was said by this Court in *Green v. Chicago, Burlington & Quincy Ry. Co.* (1907), 205 U. S. 530, 533, 51 L. Ed. 916, touching the validity of service upon an agent, jurisdiction depended upon

"\* \* \* whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there."

And in that case it was further said:

"The business shown in this case was in substance nothing more than that of solicitation. \* \* \* we

think that this is not enough to bring the defendant within the district so that process can be served upon it."

In *Minnesota Commercial Men's Assn. v. Benn* (1923), 261 U. S. 140, 145, 67 L. Ed. 573, it was ruled:

"\* \* \* we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted."

See also *Bank of America v. Whitney Central National Bank* (1923), 261 U. S. 171, 67 L. Ed. 594.

The rules are stated by the eminent scholar, Joseph H. Beale, in *A Treatise on the Conflict of Laws* (New York, 1935), Vol. II, p. 844, sec. 179.16, as follows:

"When the principal part of a transaction is performed outside the state, leaving only one small or incidental feature of it connected with the state, the foreign corporation entering into the transaction is not doing business in the state. This is true of many sales of goods outside the state. Thus, where an agent who only has authority to transmit an offer sends it from within the state to the foreign corporation and it is accepted and acted upon there, there is no business done within the state. So also, where goods are sold outside the state for delivery in the state."

And again, in the same Treatise, p. 847, sec. 179.18:

"Where a foreign corporation solicits orders in the state by commercial travelers, the orders being transmitted to the corporation at its domicile and there filled, the sale is made and the business is therefore

done at the domicile of the corporation. The foreign corporation in such a case is not doing business in the state. So if a commercial traveler is sent into the state to solicit orders and transmit them to the home office, the foreign corporation is not doing business in the state."

The Supreme Court of Massachusetts, in *Reynolds v. Missouri, Kansas & Texas Railway* (1916), 224 Mass. 379, 386, 113 N. E. 413, has held:

"The mere solicitation of business by a foreign corporation without more commonly has been held not to be the doing of business within a State."

Many other cases involving the question of what business in a state is sufficient to give its courts jurisdiction over a foreign corporation are collected in the cases above cited. A large number of them are digested by Chief Justice Simpson in his dissenting opinion in the court below (R. pp. 86-108). We have thought it unnecessary in this brief to repeat the citation and analysis of these cases. The cases relied on by the majority in the court below, including *Frene v. Louisville Cement Company*, 134 F. (2d) 511, are ably distinguished by Chief Justice Simpson as being, except in two instances, cases where the corporation, in addition to solicitation, employed agents with larger authority and engaged in intra-state activities. The two excepted cases, *Dahl v. Collette*, 202 Minn. 544, 279 N. W. 561, and *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, are shown to have fallen into the error of relying on *International Harvester Company v. Kentucky*, supra, without noting the significance of the factual situation present there, that the corporation, in addition to soliciting business, made collections through agents in the state.

The authorities hold almost without contradiction: that the mere solicitation of orders or business does not con-

stitute such doing of business within a state as will support jurisdiction of a court in the state, even of a cause of action arising in the state. They establish *a fortiori* therefore that it will not support jurisdiction to assess a tax.

**B. The person served did not have authority, express or implied, to receive service.**

The service was by delivering to and leaving with "one E. S. Alley, a salesman of the International Shoe Company" (Appellant), a copy of the Notice of Assessment (R. p. 18). Reading the Record most favorably to Appellee, it is found that E. S. Alley was employed from the head office in Missouri to work under the direct supervision and control of sales managers with offices in St. Louis, Missouri; that he was required to and did receive in Missouri instructions as to his duties, the lines of shoes to be offered the trade, selling methods and conditions, new types and kinds of shoes. He was given a sample line (one shoe of a pair). He made no sales of the samples. Possibly he was one of the Company's salesmen that rented a sample room in the State of Washington, or used a hotel room or temporary display room; for the expense of which he was reimbursed by Appellant (R. pp. 16-17), but the Record does not show that he was. He had a designated territory in which to solicit orders (R. p. 17).

His authority was **limited to exhibiting samples** of the merchandise, endeavoring to procure orders, transmitting orders to Appellant's office; he could not bind the appellant to any contract or conclude any transaction in its behalf, his authority having been limited strictly to the **solicitation of orders** (R. p. 17). The corporation had no office in the State of Washington and had no general agent there (R. p. 16).

It seems clear beyond the necessity of argument that service upon one whose authority is so limited is not serv-

ice upon an agent within the requirements for such service and is not service upon the company. Hence the rule, established in the cases cited above, that service upon a mere order-taker is not sufficient to support jurisdiction.

In *City of Fall River v. Riley et al.* (1886), 140 Mass. 488, 5 N. E. 481, the rule was found squarely that service must be upon one who is an agent:

“The finding of the jury that the person upon whom the only service was made which is relied upon was not the agent or attorney of the defendant Riley, shows that there was no legal service of the writ, and thus that the court rendering judgment had no jurisdiction of the case.”

And in *Dolan v. Keppel* (1920), 189 Iowa 1120, 179 N. W. 515, it was held that service cannot be had upon an agent, where the cause of action was entirely disassociated with the agency.

In *Thornburg v. James E. Bennett & Co.* (1928), 206 Iowa 1187, 1191, 221 N. W. 840, it was ruled:

“To constitute due process, the agent on whom service is made must be such at the time of the service.”

*Corpus Juris*, Title *Process*, sec. 101, 50 C. J., p. 495, states the rule:

“Service is not good where the person served is not an agent or where the cause of action is not connected with the business of the agency.”

In *Philadelphia & Reading Ry. Co. v. McKibbin* (1917), 243 U. S. 264, 265, 61 L. Ed. 710, Mr. Justice Brandeis, delivering the opinion of this Court, ruled:

“Even if it [a foreign corporation] is doing business within the State, the process will be valid only if served upon some authorized agent.”



See also *People's Tobacco Co. v. American Tobacco Co.* (1917), 246 U. S. 79, 62 L. Ed. 587; *Connecticut Mutual Life Ins. Co. v. Spratley* (1899), 172 U. S. 602, 609, 43 L. Ed. 569.

If it be conceded for the moment that a Washington Court would have had jurisdiction of Appellant in a suit commenced by service upon E. S. Alley and involving, for example, an allegation that merchandise purchased through him was defective, it is still a far cry from this—the type of case cited in the Court below—to a holding even that a court would have jurisdiction by such service of a suit involving an excise tax on employment. E. S. Alley had nothing whatsoever to do with employment of salesmen or payment of their commissions, acts unrelated, in the normal business establishment, to selling. He could not make a contract. It is remarked that this litigation involves a tax measured by the payments to all salesmen, of which the payments to E. S. Alley are only a small part. He could not have knowledge of what the suit was all about, for he could not know the total payments to salesmen who had territory in Washington. Moreover, the salesman in this case is one of the employees for whose potential benefit the tax if upheld is to be applied, and thus he has such a personal interest in the assessment as should disqualify service on him.

In *Armstrong Co. v. New York C. & H. River R. Co.* (1915), 129 Minn. 104, 151 N. W. 917, it was held that an agent designated by the state, through whom service may be had on a foreign corporation, must sustain such relation to the corporation that such service constitutes due process of law. E. S. Alley bore no such relationship to the appellant.

It would be manifestly impolitic to uphold service upon a salesman in a case not involving a sale. It would require of mere soliciting salesmen, notoriously happy-go-lucky fellows, good mixers, a higher degree of judgment

and responsibility than that for which they are selected, if corporations are to be bound by service on them. It would require of mere soliciting salesmen qualities which are rarely found in them. It is not required to protect the interests of citizens of the state into which they travel.

An assessment of tax goes to the very heart of corporate management. It affects the corporate capital, the charter, the whole business. Taxation has become a matter of the gravest import to business. It therefore ought to require notice to the more responsible individuals, to persons who may be said generally to represent it with respect to such matters, not notice to mere order-takers. The responsibility is such that it is only within the scope of the authority of a president, a cashier, or of an agent having discretion as is the case of one who has authority to close contracts or transactions for the corporation within the taxing state, or who has express authorization to accept service of process.

### C. The rule of *Flexner v. Farson*.

In *Flexner v. Farson* (1919), 248 U. S. 289, 63 L. Ed. 250, a leading case, in a characteristically succinct opinion by Mr. Justice Holmes, it was ruled that substituted service on an agent of an individual was not due process of law, because a state cannot exclude an individual from doing business. The validity of substituted service upon a corporation in certain instances is sustained because a state can exclude a foreign corporation; therefore may impose as a condition of its entry that it submit to service upon an agent. The reasoning, like most of Holmes' reasoning, is far reaching in both its sources and its effects. It means, that substituted service is a kind of control, and that the same principles which determine whether or not a state may control a foreign entity determine the validity of substituted service.

The State of Washington may not **control** the business

of Appellant, and has not attempted to require registration in Washington, nor the appointment of a general agent in the State authorized to accept service of process. It is not perceived how, lacking power to compel the appointment of such an agent, the State can still compel the foreign corporation to be bound by service on a salesman who is not such an agent. The meaning of *Flexner v. Farson* is that there was no jurisdiction to assess Appellant by service on its agent. It is submitted that that is the ruling of this leading case.

It had been held long before *Flexner v. Farson* that substituted service could be had upon a corporation doing business in a state, even though the business was not such as would justify the requirement that the corporation register in the State. The rule was not disturbed by *Flexner v. Farson*. It is clear that substituted service against a foreign corporation in a suit by a resident is not itself control by the State, because the corporation may remove the suit to the federal courts, which are not agents of the State. The question is therefore rather akin to one of venue than one of jurisdiction. Such cases involve only questions of conflict of laws and not constitutional questions of power. But there is no provision for removal of an assessment proceeding to the federal courts or to any other federal agency. A proceeding to which a State is a party cannot be removed to the federal courts. *Stone v. South Carolina* (1886), 117 U. S. 430, 29 L. Ed. 962. The assessment is in this respect similar to a criminal proceeding, and it has never been held that criminal jurisdiction can be obtained by substituted service in such a case, unless the corporation had been licensed to do business in the state.

The prohibition of jurisdiction when control is lacking rests in the due process clause of the Constitution, not the

commerce clause. This is demonstrated by the rulings in such cases as *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, and *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 41 L. Ed. 832, which were ruled under the decision that selling insurance is not commerce. *Paul v. Virginia* (1868), 8 Wall. 168, 19 L. Ed. 357.

## II. Jurisdiction to Impose the Tax Was Lacking.

It is submitted that it has been shown that there was no jurisdiction to take proceedings against appellant to collect the contribution in controversy. It is further submitted that there was no jurisdiction, no power, to impose liability upon Appellant.

First, it has been shown that Appellant was not doing business in Washington; had no agent in that state for the service of process. Since this is so, it follows *a fortiori* that appellant was not subject to the power of the laws of the State of Washington, especially with respect to such transactions as employment and payment of salesmen, which did not occur in that state.

But, second, even if Appellant was doing business in Washington, even if it had appointed a resident agent expressly authorized generally to receive service of process in Washington, it could not be subjected to this contribution.

The record is silent whether or not Missouri has taxed this employment. It is believed that there is no question but that it could tax it, in view of the reasons which will be set out later. To hold that payment of wages may be taxed where the work is performed would make an unworkable rule, because most salesmen travel in more than one state, and in many instances an allocation of payments to work performed in each state is impossible.

Again Beale in the work previously cited (Vol. I, p. 519, sec. 118 A. 3) states the rule:

"A personal tax may be laid upon persons subject to the jurisdiction of the state; a property tax upon all property situated in its territory; **an excise or license tax upon all privileges granted by its law:** including privilege to do acts, to carry on business, to take benefit from the law, etc." (Emphasis supplied.)

And at page 623, sec. 118 F. 2:


"The jurisdiction to impose an excise tax depends on the granting of a legal privilege by the state whether the act be done by or the privilege granted to one domiciled within the state or a foreigner."

And at page 627, sec. 118 F. 4, the same learned author writes of instances

"in which a State has sought to tax that which lies beyond the State's taxing power, such as the taxing of property situated or an act done in another State. The objection to the tax will be raised, as a federal question, under the 'due process' clause of the Fourteenth Amendment. It is then a question of Constitutional law, but it also involves the problem of jurisdiction to tax, and is therefore a problem in Conflict of Laws as well."

It will be observed that there is no difference in principle here between a direct tax, as a tax on land or a poll tax, and an indirect tax, as an excise on a privilege. One may speak of the "situs" of the privilege, meaning the place where it may be taxed, the place where the laws authorize the exercise of the privilege and where it is exercised. If the sovereign power does not extend over the land, the person or the privilege, to seize or destroy it or him, the sovereign may not impose a tax.

"All subjects over which the sovereign power of a state extends are objects of taxation, but those over





which it does not extend are upon the soundest principles, exempt from taxation." *McCulloch v. Maryland* (1819), 4 Wheat. 316, 429.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." *State Tax on Foreign Held Bonds* (1872), 15 Wall. 300, 319, 21 L. Ed. 179.

In *Commonwealth v. Standard Oil Co.* (1882), 101 Pa. St. 119, it was held that jurisdiction to tax a privilege depends upon the fact that the law of the taxing state grants the privilege.

So, also, *St. Louis Cotton Compress Co. v. Arkansas* (1922), 260 U. S. 346, 67 L. Ed. 297, wherein it was held that Arkansas could not tax premiums paid elsewhere.

In *Keeney v. Comptroller of New York* (1912), 222 U. S. 525, 56 L. Ed. 299, it was held that New York could not tax a gift made in Texas, even by a resident of New York.

In *Provident Savings Life Assurance Society v. Kentucky* (1915), 239 U. S. 103, 60 L. Ed. 167, it was held that Kentucky could not collect a tax on doing business in the state from a company whose activities in the state did not constitute doing business.

See also: *State v. International Paper Co.* (1922), 96 Vt. 506, 120 A. 900; *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, 82 L. Ed. 155; *Silas Mason Co. v. Tax Commission* (1937), 302 U. S. 186, 82 L. Ed. 187; *Fidelity & Deposit Co. of Maryland v. Tafoya* (1926), 270 U. S. 426, 70 L. Ed. 664.

The principles governing this aspect of this case are clear, although, so far as we have found, the exact question is *res integra*.

The tax in question is imposed by Laws, 1937, ch. 162, sec. 7, as amended by Ch. 214, Sec. 5, Laws 1939 (Rem. Rev. Stat., sec. 9998-107), in words as follows:

“On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment”

This is a tax upon payment of wages for services. It is not a tax on rendering services for wages. The statute is clear and unambiguous. The similar tax imposed by the federal Statute (49 Stat. 639, 26 U. S. C. A., sec. 1600) has been so construed. *Steward Mach. Co. v. Davis* (1937), 301 U. S. 548, 81 L. Ed. 1279.

The payment of wages was not made in Washington. It was stipulated (R. p. 17) that such transactions as appellant had with persons who reside in the State of Washington involving the sale and distribution of its merchandise to merchants in the State of Washington were conducted as described. No mention is made of payment of wages. *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, determines this case. The payment of wages is not made pursuant to Washington law, but pursuant to Missouri law. This is the excisable act—payment of wages—similar to the making of a gift in *Keeney v. Comptroller of New York*, 222 U. S. 525.

In the case of property taxed, a fair test of jurisdiction is power to seize the property to satisfy the tax liability. Thus a state may tax property within its territorial limits. In the case of a privilege tax, a fair test is power to prevent the exercise of the privilege. Thus, New York could not prevent the transfer of Texas real estate, and had no jurisdiction to tax such a transfer (*Keeney v. Comptroller of the State of New York*, 222 U. S. 525), and Arkansas could not prevent the payment of premiums paid for insurance even on Arkansas risks. (*St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346; *State v. International Paper Co.*, 96 Vt. 506, 120 A. 900).

In the instant case, Washington could not prevent the employment and instruction of salesmen in Missouri, nor the payment of their wages. This much is clear. It is

also true that Washington could not exclude the salesmen from Washington or prevent their soliciting for nonpayment of the contribution. Nor can it forfeit the charter of appellant, to satisfy or enforce the demand. Assuming that Washington can make an assessment, it cannot satisfy it. It has never been held that an assessment is enforceable in another state. *Moore v. Mitchell* (1930), 281 U. S. 18, 74 L. Ed. 673.

Hence, the assessment in this case, even affirmed by the Supreme Court of Washington, must be considered a nullity, since it cannot be enforced. Jurisdiction to impose a liability must mean power to impose and enforce it, and power is lacking here. The judgment of the State Court can have no more validity than the assessment of which it is merely an affirmation.

### CONCLUSION.

Appellee claims that Appellant is subject to the State of Washington's jurisdiction to tax because it paid, in the State of Missouri, wages for services in Washington solely incident to the initiation of transactions in interstate commerce ultimately terminating in Washington.

The cases ruling that jurisdiction of the courts over a foreign corporation, otherwise present in the state, is not ousted merely because its business is all in interstate commerce, are only enlightening—one step on the way—upon the question of jurisdiction of a state to tax a foreign corporation.

Although the fact that its business is solely in interstate commerce may not exempt a foreign corporation from amenability to suit its engagement in interstate commerce does not of itself subject it to state control and power to tax. The contention, when made against the jurisdiction of the courts, where such jurisdiction otherwise exists under principles of comity, based upon business being in interstate commerce is a claim of exemption from such

jurisdiction—ousting of existing jurisdiction. But as to power to tax, the claim of the state is here made affirmatively that its interstate commerce alone brings the foreign corporation into the state—makes it ipso facto subject to its control.

In *Baldwin v. Missouri*, 281 U. S., l. c. 596, Mr. Justice Holmes, dissenting, conceded that it would "be good policy to restrict taxation to a single place," but he concluded that there was nothing in the Constitution to prevent double taxation. (The view of Mr. Justice Holmes subsequently became that of the majority in *Curry v. McCannless*, 307 U. S. 357.) In this case the Court is asked to sustain jurisdiction to tax upon principles which were never heretofore believed to sustain such jurisdiction, and thereby to magnify what is concededly an economic evil. Moreover, this would not result in systematic or uniform application of the tax either against corporations or against non-corporate employers. Concededly, if the Court sustains the ruling of the Supreme Court of the State of Washington, corporations may be subjected to multiple taxation, while partnership or individual employers similarly engaged would not be subject to the jurisdiction of the State of Washington or of any other foreign state.

Respectfully submitted,

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## APPENDIX.

The pertinent portions of the statutes of the State of Washington, the validity of which are involved in this case, are here set forth. The order in which the several sections of the statutes involved are here arranged is not that followed in the references thereto in the Assignments of Error, but is that in which the sections appear in the Unemployment Compensation Act, as amended, and in effect during the period covered by the assessment, followed by other statutes referred to in the Unemployment Compensation Act.

Section 6 of Chapter 162 of the Laws\* of 1937, as amended by Section 4 of Chapter 214 of Laws of 1939, and by Section 4, Chapter 253, Laws 1941, page 881; Rem. Rev. St.,\*\* 1941 Suppl., Sec. 9998-106-c-d-e, pages 501-503:

"Section 6. (c) Appeals. When an appeal is taken, as provided in the foregoing section, unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the unemployment compensation division. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision on the claim, unless within ten days after the date of notification or mailing, whichever is the earlier, of such decision, further appeal is initiated pursuant to section 6 (c).

"Section 6. (d) Appeal Tribunals. The Commissioner shall establish one or more impartial appeal tribunals each of which shall be presided over by a salaried Examiner who shall decide the issues submitted to the tribunal. No Examiner shall hear or decide any disputed claim in any case in which he is an interested party.

\*Laws, as herein used, refers to Session Laws of Washington.

\*\*Refers to Remington's Revised Statutes of Washington.



"Section 6. (e) Review. The Commissioner may on his own motion, or upon the petition of any interested party, shall, affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. The Commissioner may transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal.

"Section 6. (i) Court Review. Within thirty days after final decision has been communicated to any interested party, such interested party may appeal to the Superior Court of the county of his residence, and such appeal shall be heard as a case in equity but upon such appeal only such issues of law may be raised as were properly included in his application before the appeal tribunal. The proceedings of every such appeal shall be informal and summary, but full opportunity to be heard upon the issues of law shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail or personally on the Commissioner, and the filing and service of said notice of appeal within thirty days shall be jurisdictional. The Commissioner shall within twenty days after receipt of such notice of appeal serve and file his notice of appearance upon appellant or his attorney of record, and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Superior or the Supreme Courts. When a notice of final decision has been placed in the United States mail properly addressed, it shall be considered prima facie evidence of communication to the appellant and his attorney, if of record.

"The Commissioner shall serve upon the appellant and file with the Clerk of the Court before trial a certified copy of his complete record of the claim which shall upon being so filed become the record in such case. No fee of any kind shall be charged the Commissioner.

for filing his appearance or for any other services performed by the Clerk of either the Superior or the Supreme Court.

"If the Court shall determine that the Commissioner has acted within his power and has correctly construed the law, the decision of the Commissioner shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Commissioner with an order directing him to proceed in accordance with the findings of the Court: Provided, That any award shall be in accordance with the schedule of unemployment benefits set forth in this act.

"It shall be unlawful for any attorney engaged in any such appeal to the Courts as provided herein to charge or receive any fee therein in excess of a reasonable fee to be fixed by the Courts in the case, and if the decision of the Commissioner shall be reversed or modified, such fee and the fees of witnesses and the costs shall be payable out of the Unemployment Compensation Administration Fund. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court to the Supreme Court as in other civil cases. In all Court proceedings under or pursuant to this act the decision of the Commissioner shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."

Section 7 of Chapter 162 of the Laws of 1937, as amended by Section 5 of Chapter 214 of the Laws of 1939 and by Section 5, Chapter 253, Laws of 1941, page 884; Rem. Rev. St., 1941 Suppl., Sec. 9998-107 a-b, p. 504:

**"Section 7. (a). Payment.**

"(1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 19 (g)) occurring during such cal-

endar year, such contributions shall become due and be paid by each employer to the treasurer for the fund in accordance with such regulation as the Commissioner may prescribe, and shall not be deducted, in whole or in part, from the remuneration of the individuals in his employ;

**"Section 7. (b) Rate of Contribution.** Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

"(1) One and eight-tenths (1.8%) per centum with respect to employment during the calendar year 1937;

"(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years thereafter."

Section 14<sub>a</sub> of Chapter 162 of the Laws of 1937, as amended by Section 12 of Chapter 214 of the Laws of 1939 and by Section 11, Chapter 253, Laws of 1941; p. 904; Rem. Rev. St., 1941 Suppl., Sec. 9998-114-c-e, pp. 521-522:

"Section 14 (c). At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except that if the employer cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last known address by registered mail. If the amount so assessed is not paid within ten days after such service or mailing of said notice, the Commissioner or his duly authorized representative shall collect the amount stated in said assessment by the distraint, seizure and sale of the property, goods, chattels and effects of said delinquent employer. There shall be exempt from distraint and

sale under this section such goods and property as are exempt from execution under the laws of this state.

"Section 14 (e). When any notice of assessment has been delivered or mailed to a delinquent employer, as heretofore provided, such employer may within ten days thereafter file a petition in writing with the Commissioner, stating that such assessment is unjust or incorrect and requesting a hearing thereon. Such petition shall set forth the reasons why the assessment is objected to and the amount of contributions, if any, which said employer admits to be due the Division of Unemployment Compensation. If no such petition be filed with the Commissioner within said ten days, said assessment shall be conclusively deemed to be just and correct. The filing of a petition on a disputed assessment with the Commissioner shall stay the distraint and sale proceedings provided for in this section until a final decision thereon shall have been made, but the filing of such a petition shall not affect the right of the Commissioner to perfect a lien, as provided in section 14.(b), upon the property of the employer. The issues raised by such petition shall be heard by the appeal tribunal, established in section 6 of this act, in the same manner and in accordance with the same procedure as is prescribed for appeals from benefit determinations, including the procedure set out in section 6 for review by the Commissioner and the Court."

Section (g) (1) of Section 16 of Chapter 214, page 856, of the Session Laws of Washington of 1939; 10 Rem. Rev. St., Pocket Part 1-326, Sec. 9998-119 (g) (i), is as follows:

"Sec. 16.

"(g) (1). 'Employment,' subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

An unnumbered section in Chapter 214 of the Laws of 1939 designated as Section 9998-119 (a) of Remington's Revised Statutes (Supp.), as amended by Section 14, Chapter 253, Laws of 1941, p. 915; Rem. Rev. St., 1941 Suppl., Sec. 9998-c-d-e-f-g, pp. 529-531:

"Section 19 (c). 'Commissioner' means the administrative head of the State Office of Unemployment Compensation and Placement referred to in section 10 of this act.

"Section 19 (d). 'Contributions' means the money payments to the state unemployment compensation fund required by this act.

"Section 19 (e). 'Employing Unit' means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ one or more individuals performing services for it within this state.

"Section 19 (f). 'Employer' means:

"(2) Prior to July 1, 1941:

"(a) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week);

"Section 19 (g) (2). The term 'employment' shall include an individual's entire service performed within, or both within and without this state if:

"(i) The service is localized in this state; or



"(ii) The service is not localized in any state but some of the service is performed in this state and

"(a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or

"(b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed; but the individual's residence is in this state.

"(3) Services not covered under paragraph (2) of this section, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the Federal government, shall be deemed to be employment subject to this act, if the individual performing such services is a resident of this state and the Commissioner approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

"(4) Service shall be deemed to be localized within a state if:

"(i) The service is performed entirely within such state; or

"(ii) The service is performed both within and without such state, but the service performed without the state is incidental to the individual's service within such state, for example, is temporary or transitory in nature or consists of isolated transactions."

Section 7 of Chapter 127 of the Session Laws of the State of Washington of 1893, p. 410; Rem. Rev. St. Vol. 2, sec. 226:

"Section 7. The summons shall be served by delivering a copy thereof as follows:

"(9) If the suit be against a foreign corporation or non-resident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof."

Chapter 86 of the Session Laws of the State of Washington of 1895, p. 170, Rem. Rev. St., Vol. 2, sec. 220:

"Section 1. Civil actions in the several superior courts of this state shall be commenced by the service of a summons as hereinafter provided: \* \* \*"





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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 107.

---

INTERNATIONAL SHOE COMPANY, a Corporation,  
Appellant.

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT  
COMPENSATION AND PLACEMENT, and  
E. B. RILEY, Commissioner,  
Appellees.

---

Appeal from the Supreme Court of the State of Washington.

## APPELLANT'S REPLY BRIEF.

LEOPOLD M. STERN,  
T. M. ROYCE,  
LAWRENCE J. BERNARD,  
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## **APPELLANT'S REPLY BRIEF.**

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### **I.**

#### **Concerning Appellees' Statement of Facts.**

To show activities and localization in Washington, Appellees assert certain things to be facts which are not supported by the record and derive implications from other facts which are without justification.

(Br. 10, par. 5). Appellees state that the salesmen "are employed by the company and work (in the state of Washington)." This statement may be construed to mean

that the employment is effected or done in the State of Washington. We assume the Appellees did not intend this meaning. The facts are to the contrary.

(Br. 11, pars. 6 and 7) These paragraphs imply that the company maintains a stock of merchandise—samples—in the State of Washington in “sample or display rooms (cost advanced by salesmen, who are reimbursed by the company).” These samples are not “merchandise,” because there is only one shoe—not a pair. They are really tools, entrusted to the possession and used by the salesmen in their operations. The display rooms do not belong to the company. The salesmen are permitted to rent display rooms for their own convenience and the company pays this expense, as it does all the other necessary or proper expenses of the salesmen.

(Br. 11, par. 10) “Salesmen are in this state continuously active in their respective territories devoting full time to the building up of the business of the company within the state.” On the contrary, it is stipulated (R. p. 17) that the salesmen’s duties and authority are limited to the solicitation of orders. If they are building up any business, it is their own business, for all they do for Appellant is solicit orders.

(Br. 12, par. 14) Appellees assert that the fact that credit is extended by the company to Washington purchasers indicates “an interest of the company in stocks of merchandise held in this state by purchasers.” We are at a loss to know what Appellees mean by this statement. The fact stated—sale on terms of credit—has no such implication. Appellees seem to mean by the word “interest” an ownership interest. If that is the meaning, it is contrary to all of the facts. Appellant has no interest in any stock of merchandise held in Washington by purchasers.



Appellees further state in this paragraph and in their argument (Br. p. 30) that the "company checks on credit, in part at least, through its salesmen." The record does not sustain this statement. It discloses that at conventions in St. Louis the salesmen at times protested against the company's limitations upon the credit of persons from whom they obtained orders. Possibly the company acceded to their protest and removed the credit limit, but there is no basis for the statement that they checked on credit of purchasers through the salesmen. We cannot find the significance of this fact and point to it merely because Appellees seem to rely on it so extensively.

The statements in Appellees' brief seem to be framed to indicate that Appellant has goods on consignment in the State of Washington. Such is not the fact.

## II.

### **The Tax Is Upon Payment of Wages, Not Upon Rendering Services. The Excisable Act Was Not in Washington.**

Appellees' brief necessitates an exact finding of the incidence of the tax. They say that the "tax in question is imposed against Appellant on services performed for it within the State of Washington and not, as Appellant would have us believe, upon wages payable to individuals performing such services" (Br. p. 17). There is some discussion of the proposition that the imposition is an exercise of the police power.

However this may be, the contribution is a tax—a "duty, impost or excise," for "together, these classes include every form of [indirect] tax appropriate to sovereignty." *Charles C. Steward Mach. Co. v. Davis* (1937), 301 U. S. 548, 581, 81 L. Ed. 1281, 1288. The contribution is the method chosen to defray the cost of an exercise of

the police power. In this, it does not differ from other taxes. Since this is so, the tax must be imposed upon the exercise of some privilege or the doing of some act by the Appellant. A tax may not be imposed upon one person for the exercise of a privilege by another, and the salesmen's rendering of services does not support a tax upon Appellant.

To find the taxable incident it is necessary only to read the statute: Section 7, Chapter 162, p. 587, Session Laws of 1937, as amended (Rem. Rev. Stat. Supp. section 9998-107) provides that the tax accrues "with respect to wages payable for employment." Bearing in mind that the tax is upon the employer, it is apparent that "wages payable" must be the subject of the tax. The tax is not upon employing the employee. If he renders no service, no tax is payable. If he renders service, but no wage is payable, no tax is owing.

The statute is related to the federal statute imposing a tax on employers (I. R. C. Sec. 1410, U. S. C. A., Tit. 26, Sec. 1410). That section reads in part as follows:

"In addition to other taxes, every employer shall pay an excise tax, \* \* \* **with respect to having individuals in his employ,** \* \* \* equal to the following percentages of the wages \* \* \* paid by him..  
\* \* \*"

The legislature of the State of Washington wrote the Washington statute with the federal statute in mind. The legislature of the State of Washington deliberately avoided the words of the federal statute. They provided that the tax is imposed "**With respect to wages payable for employment.**"

It is plain that there was a deliberate and considered purpose in avoiding the words of the federal statute, to-wit, that the tax is imposed "with respect to having individuals in his employ." The Washington statute

deliberately imposes the tax "with respect to wages payable" as distinguished from "with respect to having individuals in his employ."

The Washington tax is upon the act of paying or becoming obligated to pay wages for employment—an act of the employer. Having him in employ—the excisable act under the United States statute (*Steward Mach. Co. v. Davis*, supra)—is also the act of the employer. The rendition of services is the act of the employee. **The acts of the employee are not excisable against the employer.** It has already been pointed out that the excisable act or relationship is in Missouri, not in Washington. Appellees admit (Br. p. 25) that the wages are not paid in Washington, saying, "payment \* \* \* being made outside the state."

Appellant enjoys no privilege in Washington; it does not act there by virtue of the laws of that state; it pays no wages there; has no physical assets there; receives there no benefit of any services, for all its business is consummated elsewhere.

The stipulation of facts is silent on whether or not the tax has been paid to Missouri. But in any event, the record shows that the full tax has been paid to the federal government at the rate of 3% (R. pp. 19, 20 and 21). Thus, the full amount claimed has already been paid, and is available for administration of unemployment compensation. Federal Social Security Act, Act of Aug. 14, 1935, c. 531, Tit. III, Sec. 302, and Tit. IX, Sec. 904, 49 Stat. 626 and 640, 42 U. S. C. A., Section 502 and Section 1104; *Chas. C. Steward Mach. Co. v. Davis* (1937), 89 F. (2d) 207, aff'd. 301 U. S. 548, 81 L. Ed. 1279.

As we have heretofore pointed out, even though Appellant may be required to respond to summons in the State of Washington, that is, even though Washington tribunals may have the right to bring Appellant before them, the basic problem remains—can the State of Washington cre-

ate a liability against Appellant—impose a tax because of acts, rights, or privileges exercised by Appellant in Missouri?

On page 17 of Appellees' brief they distinguish between a tax "on the **privilege** of doing business within the state" and an "excise tax on the **right** to have persons performing services" within the state. If there is any difference between a privilege and a right, it is that a privilege can be exercised only if granted while a right exists as matter of course. Prior to the establishment of the federal-state unemployment compensation, Appellant as a foreign corporation had the right to have its salesmen soliciting orders in the State of Washington and was not subject to either a privilege or an excise tax in that state. Unemployment compensation did not change the situation. It did not grant a new privilege or create a new right. More importantly, it did not, and Congress could not, confer on the State of Washington the power of extra-territorial taxation. If, as the Appellees assert, Appellant had a right to have persons in Washington solicit orders for its merchandise, that right, like other intangibles, was vested in Appellant at its domicile beyond the jurisdiction of the State of Washington.

### III.

#### **Appellant Was Not Present in Washington.**

Any suggestion that the answer to the question of whether Appellant is doing such business within the state as to justify the legal conclusion that it is "present" in the state determines the validity of the assessment here involved is not sound. This goes just half way. If Appellant is not present in the state (and we assert it is not), then the tax may not be imposed. The converse is not true. Mere presence does not authorize the imposition of tax, for there must also be an excisable act within the jurisdiction of the state.

It seems to be agreed that if Appellant's activities were not such as would authorize substituted service as the basis of a suit, then there was no jurisdiction to assess. It is also recognized, as it must be, that mere solicitation is not enough. Therefore, Appellees argue that there is more than mere solicitation. But the cases which establish the rule that mere solicitation does not confer jurisdiction involve at least as much activity as is shown here. The agents of Appellant had "no authority beyond solicitation," as in *Peoples Tobacco Company, Ltd., v. American Tobacco Company* (1918), 246 U. S. 79, 1 c. 86; 62 L. Ed. 587. The activities were less than those involved in *Green v. Chicago, B. & Q. R. Co.* (1907), 205 U. S. 530, 51 L. Ed. 916.

It is submitted that, in determining whether or not a court has jurisdiction of a defendant in a suit and whether a state has jurisdiction to assess a tax there are three considerations:

(a) The service should be such as is reasonably calculated to give notice of the proceedings. To accomplish this, the person served must have a position of responsibility with the defendant. In all the cases his duties are related to the matter in suit. That a salesman may be served in a suit involving, for example, damages for breach of warranty of quality, does not indicate that he may be served in a suit for damages for personal injury in a defendant's factory. In the instant case, the salesman served, whose authority was limited to the solicitation of orders, had nothing to do with payment of taxes—could not pay money at all, nor receive it. Any action by him in the matter would have exceeded his authority. He could not admit liability nor any material fact.

(b) The convenience of plaintiff and defendant in having the suit in a particular jurisdiction is to be considered. A defendant should not be required to journey to a



remote place to make his defense, unless he has come there voluntarily. In the instant case, Appellant has not gone to Washington, but has centralized its activities in Missouri. The salesmen come to Missouri for instructions; the offers to buy goods are sent to Missouri for acceptance or rejection. The goods are sold in Missouri. The intent to avoid traveling to Washington is clear.

(c) The service should be such as indicates power to enforce a judgment based upon it. This is probably the paramount aspect of valid service, and alone supports service by publication, for example, and service by affixing notice to property or by attachment. The service should indicate that something can be done in the event of default. No convenience is afforded a plaintiff if he can be given only a judgment and must bring a separate suit upon the judgment elsewhere. He can as easily bring the original suit where the judgment is to be enforced. Service upon a mere solicitor does not indicate the existence of anything for the enforcement of a judgment. No property is attached; no person who can do anything (as pay money) is brought under the control of the court. The instant case is extreme: if the assessment is determined to be valid, the salesman served has no funds or property of his employer out of which to pay it; nor is there any indication of how it may be enforced.

The case of *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, illustrates this aptly. The salesmen in that case had authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky. Inferentially, therefore, they had authority to indorse the notes for collection. They controlled money in Kentucky; the corporation had assets controlled by the Kentucky residents, out of which a judgment might be paid. In the instant case, the only property in Washington is advertising matter, sample shoes of no value, for there is only one shoe of each pair.

Appellant does not claim any immunity because of the power of Congress to regulate interstate commerce or because the state tax burdens such commerce. Washington's incapacity to impose the tax upon rights or privileges exercised outside of Washington is intrinsic in the nature of sovereignty, because its jurisdiction may not extend beyond its borders. Immunity rests upon the settled principles of comity between sovereigns. One sovereignty may not claim contributions (taxes) from visitors from neighboring sovereignties resting upon acts which they did at home. "Can the Island of Tobago," asked Lord Ellenborough, "pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" *Buchanan v. Rucker* (1808), 9 East 191.

#### IV.

#### **Appellees Rely Upon Authority Which Is Not Applicable.**

Appellees, in their brief, assert that Edward S. Alley, the salesman upon whom service was made, had authority to receive service. In this, they contradict the stipulation of facts (R. p. 17), which states "The salesman's duties and authority [are] limited strictly to the solicitation of orders." This leaves no room for an inference of larger powers. There is no reason for such an inference in this case, which does not involve any alleged wrong committed by the salesman or any injury suffered by a resident of the State of Washington. Appellant has scrupulously avoided committing any injury in that state. It would not be asserted that a person injured in Missouri, for example, could go to Washington to bring suit, and obtain service on appellant by service on Mr. Alley.

Three propositions are clear, then, and each determines this case: First, that jurisdiction is not obtained by service on a salesman whose entire authority is merely to solicit.

orders for the corporation's goods. This rests on the authority of the salesman; Second, that mere solicitation of orders in a state is not such doing of business as will support service upon an agent of a corporation; and Third, that in order that a state may have jurisdiction, to create a personal liability [to exist], the corporation must be present within the state, doing some act there subject to its laws. An analysis of the cases cited by Appellees in the light of these principles shows that they are not in point upon the questions presented.

In *Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 59 L. Ed. 1239, the company was doing business in the state which imposed a tax with respect to doing business in the state measured by gross premiums. The company objected to inclusion in the measure of the tax of premiums paid outside the state by residents of the state. There was no question of the validity of service nor of the jurisdiction of the laws to create a liability. The only question was whether the measure of the liability was arbitrary and unreasonable.

We do not find in *Steward Machine Company v. Davis* (1937), 301 U. S. 548; 580 et seq., 81 L. Ed. 1279, the holding which appellees assert (Br. p. 21).

In *General Trading Company v. State Tax Comm. of Iowa* (1944), 322 U. S. 335, 88 L. Ed. 1309, no question was raised of the sufficiency of service. The tax liability was imposed upon an individual resident of Iowa upon his use of the articles purchased, unquestionably subject to the state's laws. The Court said:

"The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government."

Therefore there was no question of liability for tax. Apparently the General Trading Company appeared vol-

untarily to contest the tax liability of its customers. It does not appear how service of process was made.

In *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, the authority of the agents of the company exceeded mere solicitation, as has been shown, and at the time the liability attached it was present in Kentucky, being licensed to do business there.

The case of *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 41 L. Ed. 832, was cited in appellant's original brief to one point only: that lacking jurisdiction, a state's imposition of a liability on a non-resident is not due process, in fact is no process and therefore invalid under the constitution (for power is wanting even if the non-resident is not engaged in commerce). The question whether or not the tax here in dispute is a burden upon interstate commerce, under this Court's restrictions, is not open to argument. The insurance cases cited by appellees confirm the rule that in order for the liabilities and duties created by the laws of a state to attach, there must be jurisdiction. The insurance companies were present in the state, or had interests by virtue of writing insurance on property in the state, so that the obligation might attach.

*Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 85 L. Ed. 267, cited on page 21 of Appellees' brief, is not controlling. The primary reason for sustaining the tax there involved is stated by Mr. Justice Frankfurter as follows:

"The substantial privilege of carrying on business in Wisconsin clearly supports the tax and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders."

The tax was sustained as a tax upon corporate income received in Wisconsin, the imposition or collection of which tax was postponed until dividend was declared.

In this case the tax is upon wages paid or payable outside the State of Washington and it is not conditioned upon any right or privilege granted or conferred by Washington. The privilege of sending its representatives into Washington to solicit business in interstate commerce is neither granted, nor can it be denied by the State of Washington. As to individual employers the privilege is one of citizenship of the United States, and the Washington statute has the same application to non-resident individual employers as it has to non-resident corporate employers.

In the instant case, Appellant is not within Washington; there is nothing to which the liability to pay the tax can attach, and no person is or ever has been in Washington who is made liable, or whose authority is such that liability can be attributed through him to the Appellant.

In view of Appellees' argument (Br. p. 49) that the law provides no sanctuary for Appellant from tax, it must be noted that Appellant seeks no such sanctuary, but has already paid to the Federal Government (as is stipulated) the full amount of the tax properly due (R. pp. 19, 20, 21). If the assessment is paid, it will be turned over to the Secretary of the Treasury of the United States of America (Section 9, Ch. 162, Session Laws of 1937 of Washington; Rem. Rev. Stat. Supp., Sec. 9998-109). It is asserted that Appellant paid tax to the wrong person—having paid to the Federal Government. Instead of Appellant seeking sanctuary from tax, rather Appellees seek a bonanza, a payment to them, in duplication of what has already been paid, under the statute, to the Federal Government for the benefit of all the states including Washington. The taxing authorities of all the States of the Union could make the same accusation, with the same candor and conviction. Whether or not the tax has been paid to Missouri, on which question the record is silent, it has



been paid to the United States, and no credit has been, or can be, allowed for payment which is now claimed again by Washington. Appellant seeks sanctuary from repeated collections of the same tax, not by hiding behind sales agents, but by appeal to this Court.

Respectfully submitted,

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T. M. ROYCE,  
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November, 1945.



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JUN 4 1945

CHARLES ELMORE BROOKLY  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1345

INTERNATIONAL SHOE COMPANY,

*Appellant,*

*vs.*

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT OPPOSING JURISDICTION AND  
MOTION TO DISMISS OR AFFIRM

SMITH TROY,

*Attorney General of Washington,*

GEORGE W. WILKINS,

*Assistant Attorney General of Washington,*

*Counsel for Appellees.*



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IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

OCTOBER TERM, 1944

---

No. 1345

---

INTERNATIONAL SHOE COMPANY A CORPORATION  
*Appellant,*

*vs.*

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER

*Appellee*

---

**STATEMENT IN OPPOSITION TO JURISDICTION**

---

The appellee, State of Washington, Office of Unemployment Compensation and Placement, and E. B. Riley, Commissioner, in opposition to the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal, respectfully represents:

The judgment of the Supreme Court of the State of Washington here in question is valid, notwithstanding that appellant was a foreign corporation and engaged in the

state of Washington solely in interstate commerce, for the reasons herein set forth.

### A

Appellee has the power to require payments of contributions to the Washington unemployment compensation fund for the privilege of employing Washington residents to perform services within the state of Washington under the authority of the following laws of the state of Washington and Federal statutes, to wit: Sec. 2, chapter 162, Session Laws of 1937, Rem. Rev. Stat. Supp. Sec. 9998-102; Sec. 7(a), Chapter 162, Session Laws of 1937, as amended by Sec. 5, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-107(a); Sec. 7(b), chapter 162, Session laws of 1937, as amended by Sec. 5, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-107(b); Sec. (19) (e), chapter 162, Session Laws of 1937, as amended by Sec. 16, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-119a(e); Sec. 19(f), chapter 162, Session Laws of 1937, Rem. Rev. Stat. Supp., Sec. 9998-119(f); Sec. 19(g) (1) (2) (3) (4) and (5), chapter 162, Session Laws of 1937, as amended by Sec. 16 of chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-119(g) (1) (2) (3) (4) and (5); 53 Stat. 187, as amended by 53 Stat. 1391, 26 U.S.C., Sec. 1606(a); Sec. 19(m), chapter 162, Session Laws of 1937, as amended by Sec. 16, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-119a(m). The cited statutes are set forth in Appendix "A" attached hereto and by reference made a part hereof.

The Congress of the United States has specifically precluded avoidance of liability for state unemployment compensation contributions on the ground of being engaged in interstate commerce (26 U. S. C., Sec. 1606(a)) and this court has recognized the power of a state to require such contributions from those engaged within its boundaries

solely in interstate commerce. *Perkins v. Pennsylvania*, 314 U. S. 586, 62 S. Ct. 484; *Inter-Island Steam Navigation Company, Ltd., v. Territory of Hawaii*, 305 U. S. 306, 59 S. Ct. 202; *Standard Dredging Corporation v. Murphy, et al.*, 319 U. S. 306, 63 S. Ct. 1067, 87 L. Ed. 1017.

Moreover, aside from the Act of Congress referred to (26 U. S. C. 1606(a)), liability for contributions to a state unemployment compensation fund cannot be avoided by an employer on the ground that it is a foreign corporation engaged within the boundaries of the state solely in interstate commerce, for a state may in the exercise of its police power, and in the absence of Federal legislation on the subject, legislate concerning relative rights of employers and employees while within its borders, although engaged in interstate commerce. *Valley Steamship Company v. Wattawa*, 244 U. S. 202, 37 S. Ct. 523, 61 L. Ed. 1084. The Washington Unemployment Compensation Act was passed in the exercise of its police power for the purpose of relieving distress resulting from involuntary unemployment affecting the State of Washington. *Bates v. McLeod*, 11 Wn.(2d) 648, 120 P.(2d) 472, relying on *Carmichael v. Southern Coal & Coke Company*, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245; and the instant state court decision, *International Shoe Company v. State*, 122 Wash. Dec. 135.

## B

Appellant engaged in business through its employees in the state of Washington to such an extent as, in contemplation of law, to be present within the state and therefore amenable to service of process by the state courts.

The stipulated facts in the case at bar, which are fully set forth in the instant state Supreme Court decision, show that appellant was, through its agents in Washington, engaged in a regular systematic and continuous course of

business within the state of Washington. From these facts the state Supreme Court, applying principles of law well settled by this court, has drawn the inference that appellant was present within the state and therefore amenable to process of the state court.

Appellant in its Assignments of Error asserts an insufficient activity within the state of Washington to render it amenable to process of the Washington courts, contrary to the inference drawn by the state Supreme Court from the stipulated facts. Appellant by this appeal seeks only from this court a determination that its activities in the state of Washington were insufficient to permit the inference that it was there present so as to be amenable to the process of the Washington court.

However, the stipulated facts before this court and from which the state Supreme Court drew its inference, are, and the state court specifically recognized them to be, substantially identical to those facts relied on by this court in drawing the same inference in its applicable decisions. *International Harvester Company of America v. Commonwealth of Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479; *People's Tobacco Company v. American Tobacco Company*, 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587; *Frene v. Louisville Cement Company*, 134 F. (2d) 511. The inference drawn by the state Supreme Court cannot therefore, be said to be unwarranted; in fact, it is the only reasonable inference.

No new or novel question of law is here involved.

There is no occasion, therefore, for this court to exercise its jurisdiction to hear this appeal, for to do so would result merely in a substitution of this court's inference from the facts for the state court's inference. The Assignment of Error by appellant in this connection is unsubstantial and frivolous.



Appellee acquired jurisdiction over appellant by service of process upon an agent of appellant within the state of Washington and also by registered mail to appellant at its last known address in compliance with the statutes of the state of Washington governing service of process on foreign corporations. The statutes mentioned immediately above are Sec. 7, p. 408, Session Laws of 1893, Rem. Rev. Stat. Sec. 226, subsection 9; and Sec. 16(c) of the Washington Unemployment Compensation Act, Sec. 11, chapter 253, p. 906, Session Laws of 1941, Rem. Supp. 1941, Sec. 9998-114c. These cited statutes are set forth in Appendix "B" attached hereto and by reference made a part hereof.

Jurisdiction over a foreign corporation, present within the state, admittedly may be acquired by service on an agent of such corporation. The state statutes provide for such service (Sec. 7, p. 408, Session Laws of 1893, Rem. Rev. Stat. Sec. 226, subsection 9; and Sec. 14(c) of the Washington Unemployment Compensation Act, Sec. 11, chapter 253, p. 906, Session Laws of 1941, Rem. Supp. 1941, Sec. 9998-114c) and are plainly valid and constitutional as written.

The state Supreme Court has determined that the individual upon whom service of process was had in the instant case represented appellant in such capacity as to be its "agent" within the meaning of the state statutes in question. The conclusion that such an individual, with such determined representative capacity, is an "agent" within the meaning of the state statutes is a matter solely for the state court to decide and is binding upon this court.

Appellant by its Assignment of Error in this respect seeks a determination by this court that the individual, found by the state Supreme Court to be a true representative of appellant and an agent within the meaning of the

state statutes, was not in fact a true representative of appellant and that, therefore, due process has not been afforded.

Appellant in effect is asserting that the agent upon whom service was had in this cause was limited solely to the solicitation of orders within the state of Washington and, consequently, had no such authority as to render service on him valid service on appellant. The real question turns upon the actual character of the agent, whether he be such an agent (appellant's activities in the state being considered) that the law will imply the power and impute the authority to him (to accept service for and on behalf of appellant). If he be that kind of an agent, the implication will be made and the authority imputed despite the denial of authority on the part of appellant. *Chicago Board of Trade v. Hammond Elevator Company*, 198 U. S. 424, 25 S. Ct. 740, 49 L. Ed. 1111. Here there is a law of the state governing the service of process on foreign corporations (Rem. Rev. Stat. Sec. 226, subsection 9; Rem. Supp. 1941, Sec. 9998-114c) and the character of the agency relationship is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service. Consequently, the law will and ought to draw such an inference and imply such authority. Service under such circumstances and upon an agent of such character as was the individual upon whom service was had in the case at bar is sufficient. The state Supreme Court so ruled. *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 617, 43 L. Ed. 569, 574, 19 S. Ct. 308. The state court drew its inference (that the individual upon whom service was had was a true representative of appellant and a duly authorized agent) from facts substantially identical to those from which similar inferences were drawn by this and other courts in applicable decisions (*International Harvester Company of America v. Commonwealth of Kentucky*,

234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479; *Frene v. Louisville Cement Company*, 134 F. (2d) 511; *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915), and therefore did not deny due process; hence, the question raised by appellant in respect to valid service, having been resolved by legitimate and reasonable inference by the state court through application of principles well settled by this court, is unsubstantial and frivolous.

Now, therefore, It is hereby respectfully submitted that the questions raised by appellant in its Assignments of Error are frivolous and unsubstantial in nature; consequently, this court should not exercise its jurisdiction to review the above-entitled cause on appeal. The appeal should be dismissed or in the alternative the judgment of the state Supreme Court should be affirmed.

Respectfully submitted,

SMITH TROY,

*Attorney General of the  
State of Washington,*

GEORGE W. WILLIAMS,

*Assistant Attorney General,  
Of Counsel,*

*Attorneys for Appallee.*

**APPENDIX "A"**

Statutes of the State of Washington and Federal Statute Vesting Power in Appellee to Require Payments of Contributions to the Washington Unemployment Compensation Fund for the Privilege of Employing Washington Residents to Perform Services Within the State of Washington.

Section 2, chapter 162, Session Laws of 1937, Rem. Rev. Stat. Supp., Sec. 9998-102.

"Whereas, economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. Social security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of poor relief assistance. The State of Washington, therefore, exercising herein its police and sovereign power endeavors by this act to remedy the widespread unemployment situation which now exists and to set up safeguards to prevent its recurrence in years to come. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this act shall be liberally construed

for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum."

Section 7(a), chapter 162, Session Laws of 1937:

"(1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 19(g)) occurring during such calendar year, such contributions shall become due and be paid by each employer to the treasurer for the fund in accordance with such regulation as the director may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ;

"(2) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent."

Section 7(a), chapter 162, Session Laws of 1937, in so far as pertinent, was amended by Sec. 5, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-107(a), to read as follows:

"(1) On and after January 1, 1937, . . . such contributions shall become due . . . in accordance with such regulation as the *commissioner* may prescribe, . . .

"(2) . . .

Section 7(b), chapter 162, Session Laws of 1937:

"(b) Rate of Contribution.—Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

"(1) One and eight-tenths (1.8%) per centum with respect to employment during the calendar year 1937;

"(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years 1938, 1939, 1940, 1941;



"(3) With respect to employment after December 31, 1941, the percentage determined pursuant to subsection (c) of this section."

Section 7(b), chapter 162, Session Laws of 1937, in so far as pertinent, was amended by Sec. 5, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-107(b), to read as follows:

"(b) . . .

"(1) . . .

"(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years *thereafter*." (Subparagraph (3) of section 7(b), chapter 162, Session Laws of 1937, was deleted by the amendment by Sec. 5, chapter 214, Session Laws of 1939.)

Section 19(e), chapter 162, Session Laws of 1937:

" 'Employing unit' means any individual or type of organization, including any partnership, association, trust estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ eight or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act."

Section 19(e), chapter 162, Session Laws of 1937, in so far as pertinent, was amended by Sec. 16, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-119a(e), to read as follows:

" 'Employing unit' means any individual . . . which has or subsequent to January 1, 1937, had in its employ *one* or more individuals . . .

" *Whenever any employing unit contracts with or has under it any contractor or sub-contractor for any work*

*which is part of its usual trade, occupation, profession or business unless the employing unit as well as each such contractor or sub-contractor is an employer by reason of section 19(f) or section 8(c) of this act, the employing unit shall for all the purposes of this act be deemed to employ each individual in the employ of each such contractor or sub-contractor for each day during which such individual is engaged in performing such work; except that each such contractor or sub-contractor who is an employer by reason of section 19(f) or section 8(c) of this act shall alone be liable for the employer's contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or sub-contractor who is not an employer by reason of section 19(f) or section 8(c) of this act, may recover the same from such contractor or sub-contractor. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee: PROVIDED, The employing unit had actual or constructive knowledge of the work."*

Section 19(f), chapter 162, Session Laws of 1937, Rem. Rev. Stat., Supp., Sec. 9998-119(f) :

" 'Employer' means :

"(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week) ;

"(2) . . .

"(3) . . .

“(4) \* \* \*

“(5) \* \* \*

“(6) \* \* \*

Section 19(g)(1)(2)(3)(4) and (5), chapter 162, Session Laws of 1937:

“(g)(1) ‘Employment,’ subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

“(2) The term ‘employment’ shall include an individual’s entire service performed within or both within and without this state if: (i) The service is localized in this state; or (ii) the service is not localized in any state but some of the service is performed in this state and (a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual’s residence is in this state.

“(3) Services not covered under paragraph (2) of this subsection, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the Federal government, shall be deemed to be employment subject to this act if the individual performing such services is a resident of this state and the director approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

“(4) Service shall be deemed to be localized within a state if:

“(i) The service is performed entirely within such state; or

"(ii) The service is performed both within and without such state, but the service performed without the state is incidental to the individual's service within such state, for example, is temporary or transitory in nature or consists of isolated transactions.

"(5) Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the director that:

"(i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

"(ii) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

"(iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service."

Section 19(g)(1)(2)(3)(4) and (5), chapter 162, Session Laws of 1937, in so far as pertinent, was amended by Sec. 16, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-119(g)(1)(2)(3)(4) and (5), to read as follows:

"(g)(1) \* \* \*

"(2) \* \* \*

"(3) \* \* \* and the *commissioner* approves the election \* \* \*

"(4) \* \* \*

"(i) \* \* \*

"(ii) \* \* \*

"(5) \* \* \* until it is shown to the satisfaction of the *commissioner* that:

"(i) \* \* \*

"(ii) \* \* \*

"(iii) \* \* \*

53 Stat. 187, as amended by 53 Stat. 1391, 26 U.S.C., Sec. 1606(a), provides:

"No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."

Section 19(m), chapter 162, Session Laws of 1937:

"(m) 'Wages' means remuneration payable by employers for employment. 'Remuneration' means all compensation payable for personal services, including commissions and bonuses and the cash value of all compensation payable in any medium other than cash. The reasonable cash value of compensation payable in any medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the director."

Section 19(m), chapter 162, Session Laws of 1937, in so far as pertinent, was amended by Sec. 16, chapter 214, Session Laws of 1939, Rem. Rev. Stat. Supp., Sec. 9998-119a(m), to read as follows:

"(m) 'Wages' means the first three thousand dollars of remuneration payable by one employer to an individual worker for employment during any calendar year. 'Remuneration' means all compensation payable for personal services, including commissions and bonuses and the cash value of all compensation payable in any medium other than cash. The reasonable cash



value of compensation payable in any medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the director; *but until Congress shall amend title IX of the Federal Social Security Act approved August 14, 1935, to similarly limit the amount of taxable wages to three thousand dollars, the term 'wages' for the purposes of this act shall be deemed to mean all remuneration payable by employers for employment.*"

## APPENDIX "B"

STATUTES PROVIDING FOR ACQUISITION OF JURISDICTION OF APPELLEE OVER A FOREIGN CORPORATION PRESENT WITHIN THE STATE OF WASHINGTON THROUGH SERVICE UPON AN AGENT OF SUCH CORPORATION.

Sec. 7, p. 408, Session Laws of 1893, Rem. Rev. Stat. Sec. 226, subsection 9:

"The summons shall be served by delivering a copy thereof, as follows:

"\* \* \*

"(9) If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof;"

Sec. 14(c) of the Washington Unemployment Compensation Act; Sec. 11, chapter 253, p. 906, Session Laws of 1941, Rem. Supp. 1941, Sec. 9998-114c:

"At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except that if the employer

cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last known address by registered mail. If the amount so assessed is not paid within ten days after such service or mailing of said notice, the Commissioner or his duly authorized representative shall collect the amount stated in said assessment by the distraint, seizure and sale of the property, goods, chattels and effects of said delinquent employer. There shall be exempt from distraint and sale under this section such goods and property as are exempt from execution under the laws of this state."

IN THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA

OCTOBER TERM, 1945

---

No. 1345

---

INTERNATIONAL SHOE COMPANY, A CORPORATION,  
*Appellant,*

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT AND  
E. B. RILEY, COMMISSIONER,  
*Appellee.*

---

**MOTION TO DISMISS APPEAL OR IN THE ALTER-  
NATIVE TO AFFIRM JUDGMENT**

---

Comes now the State of Washington; Office of Unemployment Compensation and Placement, and E. B. Riley, Commissioner, appellee in the above-entitled cause, and respectfully moves that the appeal of the International Shoe Company, a corporation, appellant, above named, be by this court dismissed or in the alternative that this court affirm the judgment of the Supreme Court of the State of Washington from which an appeal has been taken upon the grounds herein stated.

The judgment of the Supreme Court of the State of Washington here in question is valid, notwithstanding that appellant was a foreign corporation and engaged in the State of Washington solely in interstate commerce, for the following reasons which disclose that the questions raised by appellant's Assignments of Error are both frivolous and unsubstantial:

(1) Appellee has the power to require payments of contributions to the Washington unemployment compensation fund for the privilege of employing Washington residents to perform services within the State of Washington.

(2) Appellant engaged in business through its employees in the state of Washington to such an extent as, in the contemplation of law, to be present within the state and therefore amenable to service of process by the state courts.

(3) Appellee acquired jurisdiction over appellant by service of process upon an agent of appellant within the state of Washington and also by registered mail to appellant at its last known address in compliance with the statutes of the state of Washington governing service of process on foreign corporations.

SMITH TROY,

*Attorney General of the State of Washington,*

By GEORGE W. WILKINS,

*Assistant Attorney General, of Counsel,*

*Attorneys for Appellee.*







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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

OCTOBER TERM, 1945

No. 107

INTERNATIONAL SHOE COMPANY, Appellant.

v.

STATE OF WASHINGTON, OFFICE OF UNEMPLOY-  
MENT COMPENSATION AND PLACEMENT and  
E. B. RILEY, COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF THE  
STATE OF WASHINGTON.

**BRIEF OF APPELLEES**

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Attorney General,  
State of Washington.

GEORGE W. WILKINS,

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**BRIEF OF APPELLEES**

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OPINIONS BELOW

The statutory appeal tribunal decision, decision of commissioner, and judgment of superior court below are included on pages 23, 38 and 41 respectively of the record. The opinion of the supreme court of Washington in the



case below is officially reported as *International Shoe Company v. State*, 122 Wash. Dec. 135, 154 P. (2d) 801, and appears in the transcript of record at page 59 ff. thereof.

### JURISDICTION

The jurisdiction of this court is invoked by appellant "under Section 237 of the Judicial Code as amended [Title 28, U. S. C. A., Sections 344(a) and 861(a)] providing for the review by the Supreme Court on appeal, where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution of the United States, and the decision is in favor of its validity." (Appellant's brief, p. 2.)

### QUESTIONS PRESENTED

1. Does the state of Washington, without violating the due process clause of the Fourteenth Amendment to the constitution, have the power and jurisdiction to impose liability for unemployment compensation contributions required by the Washington unemployment compensation act upon appellant, a foreign corporation, not licenced to do business in the state, in view of the activities of appellant's salesmen within the state?
2. Did service of process had in this cause bring appellant within the jurisdiction of the Washington courts and without violation of the due process clause of the Fourteenth Amendment to the constitution?

## STATEMENT

While appellant's statement of the cause is, in most respects, adequate, determination of this appeal resting, as it must, on the view taken of the facts disclosed as to the extent of appellant's activities within the state, we feel justified, at the expense of repetition, in setting forth here a statement of the facts upon which we submit the supreme court of the state of Washington properly determined that appellant was liable for the tax imposed; that appellant was doing such business within the state as to be subject to the jurisdiction and power of the state to impose the tax; that appellant's business within the state was such as to subject it to the jurisdiction of the Washington courts, pursuant to the service of process which was had on one of its salesmen in the state, and that judgment against appellant did not violate the due process clause of the Fourteenth Amendment to the constitution. *International Shoe Co. v. State of Washington*, 122 Wash. Dec. 135, 154 P. (2d) 801.

The record discloses:

1. Appellant, International Shoe Company, a Delaware corporation, with a principal place of business in St. Louis, Missouri, has as its principal business the manufacture and sale of footwear. (R. p. 15; Stp. F., Exhibit 1, R. p. 9.)
2. Merchandise is sold in Washington through four selling branches of the company: (1) the Roberts, Johnson & Rand branch of the International Shoe Company,

(2) the Peters branch of the International Shoe Company, (3) the Friedman-Shelby branch of the International Shoe Company, and (4) the Specialty branch of the International Shoe Company (R. pp. 15-16.) So far as appears from the record, these "branches" are no more than nominal designations of particular sales units of the company. (R. p. 15.)

3. Company, in its business of selling in the state of Washington for four years, 1937 through 1940, employed from eleven to thirteen salesmen, all of whom resided in the state and whose principal activity was the sale of the company's merchandise within the state. (R. pp. 16-17, 19-22, incl.)

4. Commissions paid to company's representatives in the state of Washington for the four years, 1937 through 1940, indicate the volume and extent of business of the company carried on by the salesmen and that it did not consist of scattered or isolated transactions, but rather a continuous course of business; the total commissions paid for 1937 being \$36,098.19, for 1938 being \$32,075.63, for 1939 being \$33,846.44, and for 1940 being \$31,879.19—or a total paid out for commissions alone in the four year period of \$133,899.45. (R. pp. 19-22 incl.)

5. All of the eleven to thirteen salesmen whose principal activities are selling within the state of Washington are employed by the company and work (in the state of Washington) under the direct supervision and control of sales managers (sales managers being located

in St. Louis). Each salesman has a designated territory within the state. (R. pp. 17, 18.)

6. Salesmen have sample lines, property of the company, issued to them for display to prospective purchasers, said merchandise being kept in the state of Washington in display rooms: (R. pp. 16, 17.)

7. Company pays for sample or display rooms (cost advanced by salesmen who are reimbursed by the company). Some of these display rooms are permanently established in business buildings in various cities in the state, and some are changed from time to time from hotel display rooms or space in business buildings rented in the particular city which the salesmen happen to be working. (R. pp. 16-17.)

8. Merchandise sold in Washington is shipped into the state on orders taken here; orders being approved in St. Louis. Shipments are invoiced at point of shipment. (R. p. 17.)

9. None of the salesmen are permitted to engage in an independently established trade, occupation, profession, or business of the same nature as is involved in selling the company's merchandise. (R. p. 17.)

10. Salesmen are in this state continuously active in their respective territories devoting full time to the building up of the business of the company within the state. (R. p. 16-17.)

11. There is a detailed program followed by the company through contact with the salesmen to keep the company's business at a high level, to eliminate difficulties arising in the particular territories, and to discuss

credit of Washington purchasers and customers with whom the company is doing business—said contact being had by means of conventions held in St. Louis twice a year with the salesmen of the four company branches in the state of Washington, being compelled to attend sometimes only once a year; each branch, for a part of the time, meeting at a different hotel. At such conventions all matters touching on the company's business in the state are discussed in detail and the salesmen are instructed as to the company's line of merchandise—probable trends—styles—advertising (advertising quotas being assigned to salesmen)—manufacturing details—prices and terms of sale of merchandise—what particular items to sell and how much, etc. (R. pp. 11-13 incl. 16.)

12. Expenses of traveling salesmen paid by company. (R. pp. 16-17.)

13. Company has been engaged in doing business in the state of Washington for many years; Edward S. Alley being with the company since 1924, and with Friedman-Shelby branch since 1936. (R. p. 10; 19-22 incl.)

14. Credit is extended by company to Washington purchasers indicating an interest of the company in stocks of merchandise held in this state by purchasers. Company checks on credit, in part at least, through its salesmen. (R. p. 12.)



## SUMMARY OF ARGUMENT

### I.

#### **The Tax In Question—Its Nature, Purpose, and Application to Activities of Appellant's Salesmen in the State of Washington**

The tax is an excise tax on the privilege enjoyed by appellant in Washington of having individuals in its employment perform services for it within the state. Distinction exists between cases involving such a tax and those concerned with a regulatory tax or licensing requirements. Details of appellant's business occurring outside of state are irrelevant. Appellant is liable for tax under the state's statutes. State and federal statutes on the subject contemplate the levy of unemployment insurance taxes against foreign corporations for services performed for them in the state.

### II.

#### **Nature and Extent of Appellant's Business in Washington**

Appellant's business in Washington was such as to justify the legal conclusion of appellant's presence in the state, thereby rendering appellant subject to the state's power and jurisdiction to tax. The "solicitation-plus" rule. Obtaining orders was the heart of appellant's business. Appellant being present in state, appellant was subject to jurisdiction and power of state to tax.

### III.

#### **Character and Extent of Appellant's Business As to Service of Process**

Appellant was doing sufficient business within the state to render it amenable to process under the state's process statutes. Although present in the state only by

its salesmen agents, appellant was still present through their activities and thus subject to jurisdiction of the state's tribunals and courts.

#### IV.

##### **Nature of Appellant's Relationship with Salesmen Agents**

Appellant's salesmen in the state of Washington had such relationship with appellant as to render service on one of such salesmen valid service on appellant. Appellant's contention of salesmen's limited authority is not controlling.

#### V.

##### **Effect of State Supreme Court's Determination**

Determination of the supreme court of a state is binding on this court as to whether the facts bring a party within the state statutes, both as to liability for a tax and as to effectiveness of service. Whether proper service was had on appellant under the state statute is for the state court to decide.

#### VI.

##### **The Law Provides No Tax Free Sanctuary**

All elements for validity of tax against appellant are present. The subject of the tax, the privilege of having individuals in employment perform services in the state, is within and extended by the state. The appellant is present within the state. Appellant's agent within the state upon whom service was made was such as to render service on such agent valid service on appellant without violating due process. The tendency is to favor jurisdiction.

#### VII.

##### **Due Process as Applied to Appellant In This Cause**

Under the facts and circumstances present, appellant

was given adequate notice by service of process on its salesman agent within the state. Due process in this case is not concerned with elements of control by state over appellant or appellant's business because the tax in question is not concerned with nor does it involve regulatory or control matters. Absence of control or right of regulation by state over foreign corporation do not prevent its presence in the state. Due process under circumstances present here is satisfied with adequate notice, which appellant had. The necessary prerequisites for the validity of the imposition of the tax on appellant being present, and appellant being subject to the taxing power and jurisdiction of the state, and amenable to service, and the service had being adequate notification to appellant so as to constitute due process, the judgment of the state supreme court must be sustained.

### VIII.

#### **Appellant's Position**

Appellant's position contravenes case and statutory law and public policy. All necessary elements are present for jurisdiction to tax and for process of the state's courts.

### IX

#### **Conclusion**

## ARGUMENT

## I.

**The Tax Is an Excise Tax On a Privilege Enjoyed By Appellant In Washington**

The fundamental question in this appeal is whether the facts disclosed by the record are sufficient to justify the conclusion that appellant was doing business within the state of Washington to such an extent as to be present within the state of Washington. If appellant was present within the state of Washington, then it was subject to the taxing power of the state, and also amenable to service.

Preliminary to this determination, however, it is necessary to have, at the outset, a clear conception of the nature of the tax. It is not a regulatory tax; it is not a license tax.

Section 7(a), chapter 162, Session Laws of the state of Washington, 1937, as amended, Rem. Rev. Stat. Supp. section 9998-107a (Appendix, p. 59), provides that:

"On and after January 1, 1937, [unemployment compensation] contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for *employment* (as defined in section 19(g)) \* \* \*." (Italics ours.)

Section 19(e), chapter 162, Session Laws of 1937, as amended, Rem. Rev. Stat. Supp., section 9998-119(e) (Appendix, p. 59) defines "employing unit" as any individual, organization, etc. "or corporation, whether domestic or foreign. \* \* \* which has or subsequent to January 1, 1937, had in its employ one [originally eight]

or more individuals performing services for it within this state. \* \* \*

Section 19(f) of the same act (Appendix, p. 60) defines "employer" as any employing unit which has individuals "in employment."

Section 19 (g) of the same act (Appendix, p. 60) defines the term "employment" as meaning " \* \* \* service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

The same section brings within the term "employment" service performed by individuals for an employer entirely within the state or both within and without the state.

It will be seen from a review of the above state statutes that the tax in question is imposed against appellant on services performed for it within the state of Washington and not, as appellant would have us believe, upon wages paid to individuals performing such services which actual payment occurs outside the state. In short, the subject of the tax is the privilege extended to appellant of having individuals in its employment perform services for it within the state of Washington.

The tax in question is not levied on the privilege of doing business within the state nor on the payment of wages occurring outside the state, but rather is an excise tax on the right to have persons performing services for the employer within the state. *Bates v. McLeod*, 11 Wn. (2d) 648, 654; 120 P. (2d) 472; *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 57 S. Ct. 868, 81 L. Ed. 1245.



It should also be noted that the tax in question is an exercise of the police power of the state of Washington, enacted primarily for the purpose of protecting Washington residents, whose livelihood is dependent upon the performance of services within the state, against the hazards of unemployment. *Bates v. McLeod, supra*, and *Carmichael v. Southern Coal and Coke Company, supra*. The measure of the amount of the tax is wages payable (earned) and not wages paid, as inferred by appellant. See section 7 (b) of the state act, Rem. Rev. Stat. Supp. section 9998-107 (b), (Appendix, p. 59).

The exaction of contributions from employers is, of course, for the purpose of building up a fund from which benefits may be paid by the state to individuals who become involuntarily unemployed.

A second prerequisite to a proper determination of the issues raised by appellant is a recognition of the clear and unmistakable distinction between cases concerned with the question of whether a corporation is doing business within a state within the meaning of statutes prescribing conditions upon which foreign corporations are permitted to do business within a state, and those cases which are concerned, as in the instant case, with whether the corporation is doing such business within the state as to justify the legal conclusion that appellant is "present" in the state and thus subject to the power of the state to levy against it an excise tax of the nature here in question. It likewise follows that if appellant's business may be so considered, then appellant is likewise present within the state so as to be amenable to the service of process upon it.

Tax cases turning on the question of whether the state had a right of control over a foreign corporation or a right

to prevent foreign corporations from doing business within the state or the power to regulate the business of a foreign corporation are primarily concerned with the question of whether there has been, in the imposition of such taxing power, a violation of the commerce clause of the constitution. With such cases we are not here concerned. If a foreign corporation is doing business so as to be "present," due process is afforded by adequate notice of the action brought. This court, in its order noting probable jurisdiction, on June 18, 1945, specified that it did not care to hear argument on the question of whether the statutes attacked placed an undue burden on interstate commerce (R. p. 123). The field of inquiry is quite narrow. Did appellant do sufficient business and of such character in the state so as to be present within the state and subject to the power of the state to levy the excise tax in question and be amenable to service of process, without violation of the due process clause of the Fourteenth Amendment to the constitution?

Attention, we think, should also be called to the fact that both state and federal legislation contemplate imposition by the state on a foreign corporation of such a tax as here in question. Section 1606 (a) of the Internal Revenue Code (Appendix, p. 66) precludes immunity from the tax in question on the part of a foreign corporation, as do sections 19 (e), (f) and (g) of the state unemployment compensation act. Rem. Rev. Stat. Supp. 9998-119 (e), (f) and (g) (Appendix, pp. 59-60). The position of appellant fails to take into consideration the important fact that the particular tax here in question, unlike a franchise or regulatory tax, does not depend upon the location or the presence of the employer, but on the place where the services are performed.

Further as to the distinctions in the types of cases see *International Text Book Company v. Tone*, 220 N. Y. 313, 115 N. E. 914, 915; *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915, 917; *State v. Scott*, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; *Lamont v. S. R. Moss Cigar Company*, 218 Ill. App. 435; *Pergl et al. v. United States Axle Company et al.* (Illinois, 1943), 50 N. E. (2d) 115; *Frene v. Louisville Cement Co.*, 134 F. (2d) 511, 146 A. L. R. 926; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479.

While we agree with appellant that facts sufficient to render a foreign corporation amenable to process of the courts may not be sufficient to render it subject to a *regulatory* or *licensing* tax, it is well settled that an excise tax, such as here in question, enacted under the police power of the state for the protection of individuals performing services within the state, is not in the same category.

## II.

### **Appellant's Business In Washington Was Such as to Render It Subject to the State's Power and Jurisdiction to Impose the Tax in Question**

That a foreign corporation cannot escape its just share of the burden of state taxation, merely because it is a foreign corporation, unless such taxation is in violation of the constitutional protection afforded to interstate commerce (which is not here involved), is well settled. Net earnings from interstate commerce are subject to income tax. *United States Glue Company v. Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135. Taxation measured by gross receipts from interstate commerce has been sustained, when fairly apportioned to commerce carried on within the taxing state. *Wisconsin and M. Railway Company v. Powers*,

191 U. S. 379, 48 L. Ed. 229; *United States Express Company v. Minnesota*, 223 U. S. 335, 56 L. Ed. 459.

In *Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 59 L. Ed. 1239, this court sustained the validity of a Pennsylvania statute laying an annual tax on gross premiums of every character received from business done by the defendant within the state during the preceding year. The right to control the doing of business within the state is not a prerequisite. In the last cited case, the court held that the tax was a tax for the privilege of doing business in Pennsylvania, and was valid, though measured in part by gross premiums paid on policies, the making of which the state could not prevent.

It was held in *Steward Machine Company v. Davis*, 301 U. S. 548, 580 *et seq.*, 81 L. Ed. 1279, that the fact that California could not prohibit or impose conditions upon the exercise of the right to enter into an employment relationship in California did not prevent it from imposing a tax on the exercise of that right in California. See also *General Trading Co. v. State Tax Com. of Iowa*, 322 U. S. 335, 64 S. Ct. 1028, where on the basis of solicitation of orders by travelling salesmen in Iowa, a Minnesota corporation, not qualified to do business in Iowa, was held not merely to be doing business in Iowa, but rather to be a "retailer maintaining a place of business" there. The Iowa use tax was sustained on that basis as not unconstitutional.

The leading case on the question before us is that of *International Harvester Company v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. In this case, the company's only business involved was conducted by salesmen; the salesmen's authority was limited to taking orders

for the company's products, said orders being subject to the approval of the general agent outside of the state; all goods were shipped from outside the state after orders were approved; the salesmen had no authority to make any contract of any kind, but were authorized to receive money, checks or drafts from purchasers indebted to the company; they had no authority to make any allowance or compromise disputed claims; all contracts of sale were f. o. b. some point outside the state, and became the property of the customer when delivered to the carrier outside of the state.

The court, on the basis of the facts in the *Harvester Company* case, held that the corporation, through the activities of its agents, was present within the state of Kentucky and that service on one of its agents in Kentucky was valid service on the corporation.

Speaking of this case, Mr. Justice Cardozo, for the court, in *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915, 917, stated as follows:

\* \* \* The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here. (Citing cases.) 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' (Citing cases.) But the problem which now faces us is a different one. It is not a problem of statutory construction. It is one of jurisdiction, of private international law. Dicey, *Conflict of Laws*, pp. 38, 155. We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it is here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within



the jurisdiction of our courts. (Citing the *International Harvester* case, *supra*.) To hold that a state cannot burden interstate commerce, or pass laws which regulate it, 'is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate-commerce character.' 234 U. S. at p. 588, 34 Sup. Ct. at p. 947, 58 L. Ed. 1479. \* \* \* The nature and extent of business requisite to satisfy the rules of private international law may be quite another thing. \* \* \* Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. *All that is requisite is that enough be done to enable us to say that the corporation is here.* (Citing cases.) *If it is here it may be served.* (Citing cases.) \* \* \* (Italics ours.)

It is, of course, appellees' contention in the instant case that through the activities of its agents, appellant did sufficient business within the state of Washington to justify the legal conclusion that appellant was present within the state of Washington and thus not only amenable to service of process (of which more will be said later), but, being present, was also subject to the jurisdiction of the state to impose the tax in question, there being no prohibition in so far as the commerce clause of the constitution is concerned. Generally, as to the taxing power of a state in respect to foreign corporations, the case of *Hoopeston Canning Company v. Cullen*, 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777, 782, is in point. It was there stated:

"In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have sub-

stantial interest in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic consideration such as the protection of the citizen insured or the protection of the state from the incidence of loss. *Alaska Packers Ass'n v. I. A. C.*, 294 U. S. 532, 542, 79 L. Ed. 1044, 1049, 55 S. Ct. 518.

\* \* \*

"The actual physical signing of contracts may be only one element in a broad range of business activities. *Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries.* Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

\* \* \*

"We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, *Osborn v. Ozlin, supra*, of the degree of interest of the regulating state in the object insured, and of the location of the property insured, are separately and collectively of great weight. Applying any of these tests, it is apparent that the reciprocals are doing business in New York and are thereby subject to regulation by that state." (Italics ours.)

Applying the principles enunciated in the above case to the facts of the instant cause compels a conclusion that there can be no question but that here the tax was validly and constitutionally levied against appellant, for we see that the place of entering into the contract of employment, the payment of wages, the fact of shipping from outside of the state, and other isolated factors or incidents occurring outside of the state, are in nowise controlling. The subject of the tax,—the taxable event—to wit, the

performance of services, was within the state and even the measure of the amount of the tax is calculated on the basis of wages *earned* within the state; payment, alone, for such services being made outside of the state.

We also see that here the state had a keen public interest in the purpose for which the tax was levied, namely, the protection of the citizens of the state and those working within the state against the hazards of unemployment.—

The importance of the state's interest in the subject and purpose of the tax is forcibly brought out in *Hoopes-ton Canning Company v. Cullen*, *supra*, where the question was whether a reciprocal insurance association which insured against risks, and whose attorneys in fact were located in Illinois, might constitutionally be made subject to the laws of New York as a condition of insuring property in that state. When we bear in mind the fact that the court there was concerned with a statute imposing a condition of doing business, which it sustained as valid; that in the instant case no question of appellant's right to do business or of regulation of appellant's business is involved whatsoever, and that the state's interest in the subject of the tax (enacted under the police power of the state) is even more evident in this case, the import of the *Cullen* decision, *supra*, is more potent.

It is also interesting to note that in the *Cullen* case, *supra*, the wisdom of the court's decision in *Allgeyer v. Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. Ed. 832, relied on by appellant in this cause in support of its position, was strongly questioned, and the *Allgeyer* case and its line of decisions clearly distinguished, the court saying, at page 783 of 87 L. Ed.:

" \* \* \* The *Allgeyer* and subsequent insurance cases have been recently considered in *Griffin v. McCoach*, *supra* (313 U. S. at 506, 507, 85 L. Ed. 1486, 1487, 61 S. Ct. 1023, 134 A. L. R. 1462) and in *Osborn v. Ozlin*, 310 U. S. 53, 66, 84 L. Ed. 1074, 1079, 60 S. Ct. 758; as the analysis in those opinions clearly indicates, the *Allgeyer* line of decisions cannot be permitted to control cases such as this, *where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state.*" (Italics ours.)

The case is not to be determined upon the basis of transactions or activities in connection with appellant's business which did not occur within the state. Rather, the question is, were those activities which did take place within the state of sufficient character and extent to justify the conclusion that appellant itself was present within the state. Our thought is well stated by Mr. Justice Gavegan, speaking for the New York supreme court, in the case of *Heer and Company v. Rose Bros. Company*, 120 Misc. Rep. 723, 200 N. Y. S. 397, 401, where he says, in respect to a similar problem:

"The question is not whether certain indicia are absent. Their absence does not inhibit a finding from positive evidence that defendant is conducting business in this state on a very considerable scale. Because we do not see the signs which we seek, we may not disregard what is evident. There would be no difference of substance if such signs were present, if concededly defendant authorized or ratified the lettering on the door, if it paid Hill a salary and paid the expenses of the office without charging them against him, or if it had more property or a bank account here. The business defendant seeks and obtains here, and its method of doing business here would not be different. What defendant does in this state is not, as defendant would have it, the 'mere solicitation' referred to in some of the cases. The fact is that a large volume of business vital to de-

pendant is systematically conducted by it here, at what is the central market in its main line. Shipments are continually made to fill orders obtained in New York City by salesmen who remain here and by others who center at New York City in season."

Of interest at this point also is the case of *Osbörn v. Ozlin*, 310 U. S. 53, 60 S. Ct. 758, 84 L. Ed. 1074, 1078, wherein the court, speaking through Mr. Justice Frankfurter, commented as follows:

"But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Assn. v. Industrial Acci. Commission*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518; *Great Atlantic & P. Tea Co. v. Grosjean*, 301 U. S. 412, 81 L. Ed. 1193, 57 S. Ct. 772, 112 A. L. R. 293. Compare *Equitable Life Assur. Soc. v. Pennsylvania*, 238 U. S. 143, 59 L. Ed. 1239, 35 S. Ct. 329. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare *Wallace v. Hines*, 253 U. S. 66, 69, 64 L. Ed. 782, 786, 40 S. Ct. 435."

Later in the opinion, after citing cases dealing with the state's power to preempt the field of insurance, it was stated, at page 1080 of 84 L. Ed.:

"\* \* \* If the state, as to local risks, could thus pre-empt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in



devising and safeguarding protection against its local hazards. *La Tourette v. McMaster*, 248 U. S. 465, 63 L. Ed. 362, 39 S. Ct. 160. \* \* \* The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

We think it evident that to follow the principles underlying the decision in the *Osborn* case, *supra*, will compel the conclusion that the state of Washington's interest in the protection of its citizens and workers against the hazards of involuntary unemployment is such as to sustain the imposition of the tax in question by the state against appellant, without exerting powers as to matters not within the bounds of the state's control or jurisdiction.

Enlightening as to prerequisites of a state's power to tax is the case of *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267; 270, where this court, in describing conditions under which the state may exercise its taxing powers, said:

"\* \* \* A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

"\* \* \* 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the

state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. See *Continental Assur. Co. v. Tennessee*, *supra*. [Citing cases.] \* \* \*

Also in point is the principle behind the statement of the court in *Hoopsteston Canning Company v. Cullen*, *supra*, 318 U. S. 319, 87 L. Ed. 777, 784:

"\* \* \* The appellants cannot, 'by spreading their business and activities over other states \* \* \* set at naught the public policy' of New York \* \* \*"

What is appellant's business? Where was it performed? As we have seen from the recital of facts in this cause, the heart of appellant's business comes from the orders obtained by its salesmen located and active in the various states including Washington. Again, as was stated in *Heer and Company v. Rose Bros. Company*, 200 N. Y. S. 397, at page 400, in respect to the manufacturing and selling corporation there involved:

"\* \* \* In an essential sense its manufacturing is subordinate to the selling of its products, for presumably it will manufacture only what it can sell. \* \* \*"

Appellant's eleven to thirteen salesmen, during the period in question, were continuously active in obtaining orders for appellant's products. They displayed samples, maintained permanent and temporary display rooms, both in business buildings and hotels, were concerned with the

credit of customers, and discussed the same with appellant on convention trips to St. Louis in order to facilitate getting more orders, and, presumably, to protect appellant in respect to its accounts in the state of Washington, and continuously solicited orders within the state of Washington, all of which resulted in a continuous flow of a great volume of merchandise into the state.

It was primarily the continuous solicitation of orders, coupled with the other mentioned activities of the salesmen, resulting in the continuous flow of a great volume of merchandise into the state that compelled the supreme court of the state of Washington in the case below, *International Shoe Company v. State*, 122 Wash. Dec. 135, 154 P. (2d) 801, to hold that appellant was not brought within the "mere solicitation" rule discussed in *International Harvester Company v. Kentucky*, *supra*, and the other cases cited herein. That a systematic and continuous course of business in the solicitation of orders and the shipment of a large volume of merchandise, pursuant thereto, to numerous customers constituted, without more, "doing business" in the jurisdictional sense, is amply supported on authority of *International Harvester Company v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *Frene v. Louisville Cement Company*, 134 F. (2d) 511; *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915; *American Asphalt Roof Corporation v. Shankland*, 205 Iowa 862, 219 N. W. 28; and *Haskell v. Aluminum Company of America* (D. C.), 14 F. (2d) 864. See also *General Trading Co. v. State Tax Com'n of Iowa*, 322 U. S. 335, 64 S. Ct. 1028 (concurring opinion 322 U. S. 349, 64 S. Ct. 1030).

Appellant, in the present appeal, urges that such matters as display of samples, continuity and volume of

solicitation and sales, etc., are merely incidental to the solicitation of orders and, therefore, constitute nothing more than "mere solicitation."

Applicable to such an argument is the answer given by Mr. Justice Rutledge, speaking for the United States court of appeals for the District of Columbia, in the case of *Frene v. Louisville Cement Company*, 134 F. (2d) 511, 518, 146 A. L. R. 926, to an argument there presented that acts of an agent which benefited the principal and promoted good will of the business of the principal was nothing more than "mere solicitation." It was there stated:

" \* \* \* The second fallacy is that anything which promotes good will is 'mere solicitation.' According to that criterion everything an employer or an agent might do which would tend to cause customers to return or new ones to come by learning of the satisfaction of old ones, would be 'mere solicitation,' and only acts harmful to the employer's interests would be a part of his business for jurisdictional purposes. The criterion is obviously untenable."

Appellant, as noted, asserts that the state of Washington has no control over appellant; that it could not and did not require registration, and that even if appellant had had a resident agent authorized generally to receive service; the state could still not impose jurisdiction because of said lack of control.

This proposition might be granted if the tax in question were a regulatory tax or one imposed for the privilege of doing business or a licensing tax. We are not, however, concerned with such a tax. The question is much more simple. If, under the "implied consent" or "presence" theories, appellant was present within the state of Washington during the period in question, then we

submit that, there being no hindrance by reason of the interstate commerce clause of the constitution, appellant cannot avoid the results of its presence, which make it not only amenable to service but also subject to the power and jurisdiction of the state to impose upon a corporation which is "present" an excise tax, such as that here in question, based upon a privilege which is enjoyed by the appellant in the state of Washington.

### III.

#### **Appellant Did Business Within the State of Washington to Such an Extent as to Render It Amenable to Service of Process Within the State and Subject to the Jurisdiction of the State's Courts**

The facts necessary to establish that a foreign corporation is doing business within the state depend entirely on the nature of the action and the issues involved. Even without regard to the distinctions mentioned, however, a new concept has been generally adopted by the courts and jurisdiction of the local forum over foreign corporations is now held to exist on a showing of "doing business" within the forum which formerly was deemed inadequate. An exhaustive treatise on authorities to this point is found in *Frene v. Louisville Cement Company*, 134 F. (2d) 511, 515, 146 A. L. R. 926, and annotation, 146 A. L. R. 941. In this case the court stated the present concept as follows:

"\* \* \* In other words, the fundamental principle underlying the 'doing business' concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting. \* \* \*



As stated by the annotators in 60 A. L. R. 994 at p. 995:

"Whether or not a foreign corporation is 'doing business' within a state depends upon the issues involved in the proceedings in which the question is raised. *Such a corporation may be doing business within the state so as to be subject to the jurisdiction of the local courts and amenable to service of process therein, and yet not be subject to a statute regulating foreign corporations or prescribing conditions or their doing business within the state.* The basis of this distinction lies in the fact that the power of the state to subject a foreign corporation to local regulations is restricted by the commerce clause of the Federal Constitution, but that a state may subject such corporation which is 'present' in the state to service of process therein, notwithstanding the fact that the local activities of the corporation are confined to transactions in interstate commerce, the state's power to provide for such service of process not being affected by the commerce clause of the Federal Constitution." (Citing cases—including *International Harvester Company v. Kentucky* (1914), 234 U. S. 579, 58 L. ed. 1479, 34 S. Ct. 944; and *Tauza v. Susquehanna Coal Company*, (1917), 220 N. Y. 259, 115 N. E. 915). (Italics ours.)

It will be conceded that if the company was doing business within the state of Washington so as to subject it to service of process by the state, it was doing so through its salesmen. In this regard, the comment in the *State v. Scott* case, *supra*, 39 S. W. 1, is in point, where it is stated:

"\* \* \* Instead of coming into this state themselves to solicit orders, those citizens of other states employ agents to do that for them; and what the agents do has the same relation to, and the same effect upon, the ultimate and finished transaction, as would the same thing if done in person by those citizens of other states. With respect to that par-

ticular matter, the agents stand before the law exactly as their principals would stand if they had come on the same mission, \* \* \* " (Italics ours.)

On this subject, as we have seen, *International Harvester Company v. Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, is the leading case. While there has been much discussion in respect to the facts on which that decision was based, showing that the salesmen, who there solicited orders had the authority to receive payment from customers in money, checks or drafts, that case is still unimpeached authority for the proposition that a foreign corporation may be made present within a state and amenable to service of the process of its courts by activities of such corporation's salesmen which constitute very little more than *mere* solicitation in order to render such corporation present and amenable to process. This is so whether the foreign corporation be registered or licensed, or subject to the state's right to demand that it be registered or licensed or not, and whether the corporation's business conducted by such salesmen within the state be wholly of interstate character or not.

In the *International Harvester Company* case, *supra*, the company appeared and moved to quash the return, claiming service was not made upon an authorized agent of the company and that the company was not doing business within the state of Kentucky. The court said, 234 U. S. 579, 58 L. Ed. 1479, 1481:

"For some purposes a corporation is deemed to be a resident of the state of its creation; but when a corporation of one state goes into another, in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that state. \* \* \* [Case cited.]

As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with, and that the corporation is actually doing business within the state."

In respect to the facts, hereinabove summarized, the court said, at p. 1482, of 58 L. Ed.:

"\* \* \* In order to hold it responsible under the process of the state court, it must appear that it was carrying on business within the state at the time of the attempted service [service was had on salesmen in the state of Kentucky]. As we have said, we think it was. *Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction.* The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. *This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state.*"

"In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check, or draft, and to take notes payable at banks in Kentucky." (Italics ours.)

In response to a contention that being engaged in interstate commerce the corporation was not amenable to process, the court continued, at p. 1483:

"We are satisfied that the presence of a corporation within a state necessary to the service of process

is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state." (Italics ours.)

A case similar to the *Harvester Company* case, and one frequently cited as authority on the question here at issue, is that of *American Asphalt Roof Corporation v. Shankland*, 205 Iowa 862, 865, 870, 219 N. W. 28, 60 A. L. R. 986, where in respect to facts somewhat similar it was properly observed that:

"The term 'doing business' within a state foreign to the one in which the corporation is organized and has its principal place of business is substantially defined by the Supreme Court as follows:

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is by its duly authorized officers or agents present within the state or district where service is attempted." [Citing cases.]"

The court then quoted at length from the *International Harvester Company* case, and commented thereon as follows:

"We desire at this point to direct particular attention to the portion of the court's [in *Harvester Company* case] own language printed in italic. The continuous course of business referred to was the solicitation of orders, [italics by court] which were sent to another state, and in response to which the machines of the *Harvester Company* were delivered within the state of Kentucky. The court said, 'This was a course of business,—not a single transaction.' It is true that the above language is followed by a reference to the fact that the agents were authorized to receive notes, drafts, checks, money, etc., and

transmit the same to the Harvester Company. Such transactions were, however, merely formal acts, and involved the exercise of no discretion on the part of the agent, and were always referable to transactions closed by the approval of the order, and, no doubt, generally by the delivery of the machines. These transactions are not given significance in what the court terms a continuous course of business.

\* \* \* \* \*

"Speaking for the circuit court of appeals of the ninth circuit, District Judge Hawley, in *Denver & R. G. R. Co. v. Roller, supra*, used the following significant language:

"The general drift and tendency of judicial decisions, state and national, is in the direction of placing corporations upon the same plane as natural persons, in regard to the jurisdiction of suits by or against them. The statutes of the different states and of the United States have, as a general rule, been liberally construed for the purpose of sustaining this view, although the decisions of the state courts upon the precise point under discussion are not entirely harmonious. We are of opinion that the decided weight of authority and of reason is in favor of the jurisdiction of the state court over the present action, under the provisions of the statutes of California above cited, and upon the facts disclosed by the record."

\* \* \* \* \*

"We recognize that the question is by no means free from difficulty; but it seems to us that the facts disclosed by the record establish that petitioner was, and has been for many years, engaged in a systematic and continuous course of business in the solicitation of orders and the delivery and shipment of merchandise to numerous customers, new and long established, and that such conduct constitutes doing business in this state, within the meaning of that term as used in Section 11072, and as construed and interpreted by the decisions of the Supreme Court of the United States. If the corporation was doing business in this state, it will hardly be questioned that Killingsworth was a proper person upon whom service might be had. We shall,



therefore, forego discussion on this point. It follows that the writ must be, and it is, annulled." (All Justices concur.) (Italics ours.)

Indicative of the extent to which the courts have gone in holding a foreign corporation to be present within a state, by reason of activities of order solicitors therein, is the case of *Frene v. Louisville Cement Company*, 134 F. (2d) 511, 146 A. L. R. 926. Typical of many like statements contained in the decision is that of the court at page 516 of 134 F. (2d):

"It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense.  
\* \* \*

Mr. Justice Rutledge did not abandon the above views when elevated to the United States Supreme Court. *General Trading Co. v. State Tax Com'n*, concurring opinion, 322 U. S., 349, 64 S. Ct. 1030.

In *Glynn v. Hyde-Murphy Company* (1920), 113 Misc. 329, 184 N. Y. S. 462, 463, it was held that a foreign corporation was doing business within the state to such an extent as to be amenable to service of process therein, where its sales agents continuously solicited orders for goods to be shipped into the state to the purchasers by the corporation, the court saying:

"\* \* \* We think that there was a continuous and permanent course of business transacted by defendant here. Agents here were continually employed to solicit and forward orders to defendant, to be filled in its factory in Pennsylvania. Suydam was clearly the sales agent in charge of the New York office. The defendant's name appeared on the door, its name at said address in telephone directory,

its letter heads state its New York office address, and its vice president directly in one of its letters referred to it. The 'fair measure of permanency and continuity' of activities, appearing in the moving papers, is sufficient to subject it to the jurisdiction of our courts."

To like effect is the case of *Heer and Company v. Rose Bros. Company* (1923), 120 Misc. Rep. 723, 200 N. Y. S. 397, and *Bogert and Hopper v. Wilder Manufacturing Company* (1921), 197 App. Div. 773, 189 N. Y. S. 444, where a foreign corporation was held to be doing business within a state, under a statute providing for service of process, where for six weeks it maintained a room in a hotel in the state during a trade fair, having its name over the door of the room, and had samples of its goods on display in said room and its agent in charge of the room solicited orders for goods to be shipped from another state to the purchasers, although such orders were not binding upon the corporation until approved by it at its home office.

In line with the great weight of authority on the point in question, (when the distinction between the cases dealing with corporations doing business so as to be amenable to process and cases dealing with corporations doing business as affected by statutes imposing conditions or regulations on doing business, is carefully noted) is that of *Tauza v. Susquehanna Coal Company*, 220 N. Y. 259, 115 N. E. 915, 917, where, speaking for the court, Mr. Justice Cardozo, in his opinion, summed up the material facts as follows:

" \* \* \* In brief, the defendant maintains an office in this state under the direction of a sales agent, with eight salesmen, and with clerical assistance, and through these agencies systematically and regularly

solicits and obtains orders which result in continuous shipments from Pennsylvania to New York."

Mr. Justice Cardozo then proceeded in regard to these facts as follows:

"To do these things is to do business within this state in such a sense and in such a degree as to subject the corporation doing them to the jurisdiction of our courts. The decision of the Supreme Court in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. ed. 1479, is precisely applicable. \* \* \* That case goes further than we need to go to sustain the service here. It distinguishes *Green v. Chicago, B. & Q. Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. ed. 916, where an agent in Pennsylvania solicited orders for railroad tickets which were sold, delivered, and used in Illinois. The orders did not result in a continuous course of shipments from Illinois to Pennsylvania. The activities of the ticket agent in Pennsylvania brought nothing into that state. In the case at bar, as in the *International Harvester Case*, there has been a steady course of shipments from one state into the other. The business done in New York may be interstate business, but business it surely is."

After referring to cases involving statutes which license foreign corporations to do business within the state, the opinion continues at p. 918:

"\* \* \* The essential thing is that the corporation shall have come into the state. When once it is here, it may be served; and the validity of the service is independent of the origin of the cause of action. \* \* \* It is not necessary to show that express authority to accept service was given to the defendant's agent. His appointment to act as agent within the state carried with it implied authority to exercise the powers which under our laws attach to his position. \* \* \* If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit. \* \* \* (Italics ours.)"

Several cases are then cited which the court held not to be *contra* to the ruling being made, saying:

"\* \* \* In those cases, the corporations had no agent within the state. The attempt was made to hold them by service on a public officer, whom the statute required them to designate as their agent, but whom they had refused or failed to designate. In the case before us, we have to deal with a very different situation. *The corporation is here; it is here in the person of an agent of its own selection; and service upon him is service upon his principal.*" (Italics ours.)

Touching both on the question of legal process and the question of liability of a foreign corporation engaged in interstate commerce for state compensation payments, the Pennsylvania court, in the late case of the *United Fruit Company v. Department of Labor and Industries*, appellant (March, 1942), 344 Pa. 172, 25 A. (2d) 171, 172, 173, states as follows:

"The Commonwealth seeks to impale the company on the horns of a dialectic dilemma—either that our Workmen's Compensation Act is not applicable to its employees and therefor there is no need for the Company to apply for the privilege of self-insurance; or, if they do come within the act, the Company is not entitled to any privileges or benefits thereunder unless it first registers to do business within the state. Neither of these propositions can be sustained.

"\* \* \* \* \*

"The Commonwealth suggests that the Company cannot be reached in this state with legal process unless it registers. There is no basis for this apprehension, inasmuch as *unregistered foreign corporations, even though engaged exclusively in interstate or foreign commerce, are not immune from the process of the local courts if they carry on business here in such sense as to manifest their presence within the state. International Harvester Company of America v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479.*" (Italics ours.)

## IV

**Appellant's Salesman Upon Whom Service Was Had Was  
Such an Agent as to Render Such Service Valid as to  
Appellant**

Service of process upon Edward S. Alley, appellant's salesman in Washington, was made pursuant to Sec. 14 (c) of the Washington Unemployment Compensation Act providing for service of the order and notice of assessment (service of which initiated the present cause against appellant below) in the manner prescribed for the service of summons in civil actions which is provided for by section 7 of chapter 127, Session Laws of the state of Washington, 1893, page 410; Rem. Rev. Stat., section 226 (Appendix, p. 65) which provides:

"Section 7. The summons shall be served by delivering a copy thereof as follows:

\* \* \* \* \*

"(9) If the suit be against a foreign corporation or non-resident joint stock company or association *doing business* within this state, to *any* agent, cashier or secretary thereof." (Italics ours.)

Said section 14 (c) of the Washington act also provides for service by mailing the notice of assessment to an employer who cannot be found within the state, to his last known address by registered mail. Both methods were followed (R. p. 18).

Was appellant's salesman, Edward S. Alley, a resident of the state of Washington and engaged in Washington full time as appellant's authorized agent to solicit orders for appellant's footwear, such an agent of appellant as to constitute service of process on him good and valid service on appellant? Appellant contends he was not, his authority being limited to solicitation of orders.



If appellant was doing business in Washington so as to be "present" there, it was doing so through its agents. We have seen that orders for its merchandise was the heart of appellant's business and that activities performed in obtaining orders is "doing business" so as to render appellant amenable to service if such activities constitute anything more than "mere solicitation." *Hoopeston Canning Company v. Cullen*, 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777; *International Harvester Co. v. Kentucky* (1914), 234 U. S. 579, 34 S. Ct. 944; *Frene v. Louisville Cement Co.*, 134 F. (2d) 511, 146 A. L. R. 926; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915; *People's Tobacco Co., Ltd. v. American Tobacco Co.*, 246 U. S. 79, 62 L. ed. 587.

The effect of salesmen's activities is well stated in *State v. Scott* (1897), 98 Tenn. 254, 36 L. R. A. 461, 39 S. W. 1, 60 A. L. R. 994, 995, where the court makes the sensible and logical observation that:

" \* \* \* Instead of coming into this State themselves to solicit orders, those citizens of other States employ agents to do that for them; and *what the agents do has the same relation to and the same effect upon the ultimate and finished transaction as would the same thing if done in person by those citizens of other States.* With respect to that particular matter, the agents stand before the law exactly as their principals would stand if they had come on the same mission; \* \* \*." (Italics ours.)

In *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; the court, in dealing with the question of whether service on an agent of a foreign corporation doing business in a state was valid service on the corporation had the following to say:

" \* \* \* Even though we might be unprepared to say that a service of process upon 'any agent'

found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether upon the facts of this case the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. \* \* \*

While we do not cite the *Spratley* case, *supra*, as being factually identical to the instant cause, the principles therein set forth are certainly applicable to the point here under discussion. The court there stated the question as follows:

\* \* \* It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of agent employed. \* \* \* The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.

\* \* \* If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient."

Commenting on the method of business done by foreign corporations generally and the trend of the law to extend jurisdiction of the forum where causes of action arise the opinion most aptly observes that:

"A vast mass of business is now done through the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing

such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises."

Relying strongly on the *Spratley* case the Minnesota court in *Armstrong Company v. New York C. & H. R. R. Company*, 129 Minn. 104, 151 N. W. 917, 919, stated:

"\* \* \* It is reasonable that a foreign corporation, keeping and maintaining agents in this state for procuring business for its benefit and profit, should answer in this forum to a citizen of this state for a breach of contract or duty arising out of business so procured, and that agents engaged in procuring such business should be deemed the representatives of the corporation for the purpose of bringing it into court as well (see *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 613, 19 Sup. Ct. 308, 43 L. Ed. 569); and we believe the authorities are in harmony with this view." (Italics ours.)

To the same effect is the decision of this court in *Board of Trade of City of Chicago v. Hammond Elevator Company*, 198 U. S. 424; 25 S. Ct. 740; 49 L. Ed. 1111, wherein it was held that denial by officers of the corporation that the agent served was clothed with sufficient authority to make such service good as to the corporation and that where the facts disclosed that the implication of such authority was reasonable, the law would impute that authority to the agent. The court there noted the undesirable results of not so holding and stated in part at page 1119, 49 L. Ed.:

"\* \* \* It is evident that if these correspondents be not regarded as agents in these transactions, it is possible for the defendant to establish similar correspondents in a dozen cities in at least a dozen states of the union, and an enormous business be built up, in which the defendant company is the real principal, with no possibility of being sued except in the states of Indiana and Delaware."

Likewise relying on the *Spratley* case is *Tauza v. Susquehanna Coal Co. supra*, where Mr. Justice Cardozo, speaking for the court stated in respect to the validity of service of process upon the salesman of a foreign corporation:

" \* \* \* It is not necessary to show that express authority to accept service was given to the defendant's agent. *His appointment to act as agent within the state carried with it implied authority to exercise the powers which under our laws attach to his position. (Citing cases.)*"

In *Denver and R. G. R. Co. v. Roller*, (C. C. A. 9th Circuit) 100 Fed. 738, 741, District Judge Hawley, speaking for the court, said:

" \* \* \* It will be noticed that, if there is no cashier or secretary upon whom service can be made, the Code does not specify the extent of the agency required in order to bind a nonresident corporation by service of summons, except that the person must be a 'managing or business agent.' It is obvious that this does not mean that it must be the general managing agent of the corporation. *The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the state where the service is made.* \* \* \*

"In *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.* (C. C.) 13 Fed. 358, the court said:

" \* \* \* At common law, process must be served on its [a foreign corporation] principal officer within the jurisdiction of the sovereignty where the corporate body exists. But it can waive this requirement, and consent to be served in a different manner, and when it does this it stands on the same footing with a natural person. *When it avails itself of the privileges of doing business in a state whose laws authorize it to be sued there by service of process upon*

*an agent, its assent to that mode of service is implied. Accordingly it has been repeatedly held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the state provide, when it invokes the comity of the state for the transaction of its affairs. (Citing cases.)"* (Italics ours.)

## V

**The State Court's Determination Is Binding as to Facts Necessary to Bring Appellant Within the State's Statutes**

Whether Mr. Alley, appellant's salesman-agent, upon whom service of process was had in the instant cause, was such an agent as contemplated by the state statute (Rem. Rev. Stat. section 226, subsection 9) is certainly a matter solely within the province of the state supreme court to decide and its decision in the cause below that Mr. Alley was such an agent is binding upon this court. *International Harvester Co. v. Kentucky* (1914), 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. As stated in *General Trading Company v. State Tax Commission of Iowa*, 322 U. S. 335, 337, 64 S. Ct. 1028, 1029, 88 L. Ed. 1309, 1311:

" \* \* \* The application by that Court [Iowa Supreme Court] of its local laws and the facts on which it founded its judgment are of course controlling here. \* \* \*"

For this court to say in review of the decision of the supreme court of the state of Washington that appellant was not "doing business" or that Mr. Alley was not an "agent" within the meaning of the state service statute, Rem. Rev. Stat. section 226, subsection 9, is to do no more than to say that in view of the facts disclosed by the records in this cause, the state supreme court's determination of these questions was entirely arbitrary and capricious, there being no substantial evidence to support the



view taken, and that consequently appellant, not having been shown to be doing business within the state, could not have been "present" therein and thus the due process clause of the Fourteenth Amendment to the constitution is violated in holding it subject to the jurisdiction of the state court.

Such a conclusion on the part of this court would, we submit, require blind indifference to the principles laid down by this court and the majority of the state courts. As to the facts disclosed in this cause, we submit that it is not only fair and reasonable, but necessary, to conclude that appellant was "doing business" within the state of Washington to such an extent as to indicate most clearly its presence in the state. It was present through its salesmen, whose activities produced the very business upon which appellant's existence as a going concern was dependent. As clearly pointed out by the state supreme court in its decision in this cause, below, appellant was present through its agents, not occasionally but continuously. Said agents devoted their full time, over a period of years, to the building up of appellant's business in Washington through competent display of appellant's sample lines in display rooms, some of which were permanently maintained in business buildings and others of which were temporarily maintained in cities within the state frequently visited by appellant's salesmen. The adequate display of appellant's products was a result of a careful and elaborate training program on the part of the appellant pursuant to which its salesmen were required regularly (usually twice a year, and at least once a year) to attend training conferences at St. Louis, Missouri. (R. pp. 10-13.) These activities resulted in a large volume of sales and

continuous flow of appellant's merchandise into the state (R. pp. 19-22), and likewise resulted in appellant's close contact with its credit accounts within the state. (R. p. 12.) Appellant would have this court state that all of this was incidental solely to and constituted nothing more than mere solicitation. The authorities do not bear out such contention.

## VI.

### **The Law Provides No Sanctuary For Appellant From Tax. Appellant May Not Hide Behind Sales Agents**

To adopt appellant's contentions in this cause is to ignore entirely the steadily increasing trend on the part of the courts generally to extend jurisdiction of the local forum in cases of this type over foreign corporations. As was stated by Mr. Justice Gray in *Barrow Steamship Company v. Kane*, 170 U. S. 100, 42 L. Ed. 964, 966:

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

*Beach v. Kerr Turbine Company*, (D. C.), 243 Fed. 706, 711: "The tendency of legislation and of judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations. \* \* \* *Frene v. Louisville Cement Co.*, 134 Fed. (2d) 511, 516: "\* \* \* In general the trend has been toward a wider assertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up."

## VII.

### **Due Process In This Cause was Satisfied by Adequate Notice**

The constitutional requirement of due process insofar as it is concerned with the service of process upon an

agent in a case of this nature is, we submit, satisfied if the individual upon whom service is made is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service. *Denver & R. G. R. Co., supra*. And certainly it must be said here that in view of the very close connection between appellant and its employe-salesman, Mr. Alley, service upon the latter made it reasonably certain that appellant would be notified of the service. Furthermore, while perhaps not determinative, the fact should not be overlooked that service was also had upon appellant in this cause by mailing the notice of assessment by registered mail to appellant at its principal place of business in Missouri. In point in this respect is *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569, 572, wherein speaking of a similar situation, the court took occasion to note that taking service on the agent in that case in connection with service provided for in the statute of a copy of the process of notice by registered mail to the home office of the company "it must be admitted that one of the chief objects of all such kinds of service, mainly, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. \* \* \*". The constitutionality of service statutes is dependent only on the presence and efficacy of the means adopted to give the defendant actual notice of the proceedings. *Wuchter v. Pizzutti*, 276 U. S. 13, 72 L. Ed. 446.

### VIII.

#### **Appellant's Position Not Supported By Authorities and Contravenes Public Policy**

We submit that Mr. Alley's status as an agent of appellant was of sufficient rank and character so as to render

service on him good and valid service as to appellant. Appellant has suggested that Mr. Alley had no knowledge of tax matters and that his interest in this suit would, in any event, disqualify him as a proper agent upon whom service could be had. Authorities are entirely lacking to support appellant's contention that these factors render service unconstitutional as to appellant. Appellant chose to conduct what is a major and vital part of its business in the state of Washington through salesmen-agents such as Mr. Alley and certainly it is estopped in the event of a suit of this nature being brought against it from saying that for the purposes of the suit it was not present within the state through its selected and employed salesman. As a matter of fact the suit involves the very thing which appellant's salesmen were engaged in doing, to-wit: performance of services for appellant within the state of Washington. And certainly if interest is to disqualify, the officers of the corporation themselves, if they had been engaged in doing for the corporation what Mr. Alley was doing, would *a fortiori* be disqualified.

Appellant, in its brief to this court, urges strongly the case of *Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250, as authority for its contention that there is no jurisdiction in the instant cause to assess appellant by service on its agent. Appellant contends further in this connection that in this cause, substituted service is involved and that to be valid as against appellant, there must be a showing that the state has at least the right to control the business of appellant, or to require its registration in Washington.

The complete answer to appellant's contentions in this respect is, of course, that the *Flexner* case simply is not in point. That case deals with actual substituted

service as such. There a partnership was existent in Illinois. Suit was brought in Kentucky by service on Flexner, who had been, *but at the time of suit was not an agent of the partnership in Kentucky*. It was argued that the Kentucky service statute made Flexner a *continued* agent for the purpose of service, in respect to suits arising out of business done in Kentucky at a time when Flexner actually was an agent there of the partnership. This argument was based on an analogy of foreign corporation law to the effect that in a case where the state could control a corporation by requiring a designated agent in the state, such agent could thereafter be served, and that such service would be valid as against the corporation, even after the corporation had ceased doing business there.

In the instant cause, we have neither an end of the agency relationship at the time of service, nor substituted service, nor do we have any control question present whatsoever. The service statute of the state of Washington here in question is entirely different than that involved in the *Flexner* case and does not purport to continue one formerly designated as an agent as the proper agent for suits after termination of an agency in Washington or after termination of the corporation's prosecution of business in Washington.

It is very evident that appellant's reliance on the *Flexner* case is in disregard of the facts and circumstances involved in the instant cause. Certainly, the *Flexner* case, *supra*, and the line of authorities following it, has no effect whatsoever upon the well settled rule that a foreign corporation not registered nor licensed to do business in the state, nor subject to the state's rights to



compel such registration or to impose conditions upon the right to do business in the state may nonetheless be doing business within the state to such an extent as will justify the legal conclusion that the corporation itself is, through its agents, actually present within the state and thus subject to the state's jurisdiction and power to tax and to the process of the state's courts.

We are not here concerned with a corporation which has, at the time of institution of the proceedings in question, ceased doing business, nor with the question of service upon one who was not at the time an employee of the corporation, engaged in performing services for the corporation. Again, as to due process, under the circumstances here present, the question turns solely upon the presence and efficacy of the state's service statute to provide actual notice to the corporation of the institution of proceedings against it.

Appellant urges also that the state of Washington has no means of enforcing the judgment rendered against it for the tax in question, and that because of this fact the judgment is a nullity; appellant arguing further that jurisdiction to impose a liability must mean power to impose and enforce it, and that because such power is claimed to be lacking there is no validity in the judgment. The simple answer to such a contention is, of course, that this court is in no way concerned in this appeal with any question of enforcement of the judgment in question. That issue is not before it.

It should be noted, however, that to adopt appellant's contention in this respect would be to nullify and render entirely impotent the whole unitary federal-state plan which Congress and the legislatures of each of the several

states have adopted for the purpose of providing relief to a host of workers against the hazards of involuntary unemployment. *Buckstaff Bath House Company v. McKinley*, 308 U. S. 358, 84 L. Ed. 322; section 1606(a), United States Internal Revenue Code, formerly section 906, Social Security Act of 1935, Title IX (Appendix, page 66).

### CONCLUSION

Appellant, through the activities of its salesmen in the state of Washington during the period in question, was doing business within the meaning of the state service statute, providing for service upon such a foreign corporation by service upon any agent of such corporation. Mr. Alley, appellant's salesman-agent in the state of Washington, was such an agent, as contemplated by said state service statute.

The facts disclosed in the record in this cause show activities on the part of appellant's salesmen, including Mr. Alley, which constituted more than "mere-solicitation." Appellant, being "present" within the state at the time suit was instituted and at all times in question, cannot support its contention of immunity on the basis of cases concerning the power of a state to impose conditions upon the right of a foreign corporation to do business. With regulatory taxes, licensing requirements, and exactions levied by a state for the privilege of doing business, we are not concerned.

The agent served in the instant cause had such relationship with appellant as to render service on him valid as to appellant. The trend of the law has, for a long

time, been in the direction of extending the jurisdiction of the states over foreign corporations, especially in cases of this kind where public policy and public interest in the objects to be attained are clearly evident. Under the authorities which are relevant and in point, the judgment of the state supreme court in this cause below must be affirmed as valid and not in contravention of any constitutional requirement, guarantee or prohibition.

There is a compelling practical reason, founded in public policy and endorsed by the federal Congress and the legislatures of each of the several states, why the jurisdiction of the state courts over foreign corporations should be extended to cover those similarly situated with appellant. The tax, the imposition of which appellant claims violates due process, is for the protection of workers in the various states against the hazards of unemployment. The unitary federal-state plan, adopted by Congress and the legislatures of the states, is designed to protect against the very result which appellant, asserting its non-resident foreign character, urges must obtain, due to its carefully worked out plan for doing business in the various states so as to be present there for all purposes beneficial to it, but not present so as to be compelled to bear its just share of the burden of local state government. The state act brings non-resident foreign corporations within its operation to the same extent as resident and domestic corporations. It is evidently felt that workers, especially those resident within the state, performing services and earning their livelihood (wages) in the state, should have the benefit of wage credits set up for them by the state, where they live and work, and where their period of unemployment, if any, is most likely to occur.

To adopt appellant's contentions would not only force the various states to all journey to appellant's chosen situs to solicit from it its fair and just share of the expense of local governmental functions, but, if appellant be held not liable in the state where its employees are doing a vital part of its business, then the anomalous situation is presented of a state being required to pay benefits to appellant's employees, who have earned their wages in that state, out of that state's fund which is built up by contributions of appellant's competitors. Certainly, conscience does not permit the assumption that appellant's employees should have to look to a fund established in Missouri (and there is no showing that they have any rights to Missouri's unemployment compensation fund) and, when financially embarrassed at a time of unemployment, be required to seek redress from a denial of benefits by Missouri in the courts of that state.

The law and the record and appellant, in its brief, are all silent as to how its employees, performing services for it in Washington (for which privilege enjoyed by appellant in Washington the tax is assessed) are to have protection against the hazards of involuntary unemployment, if appellant's contention be sustained, except at the expense of appellant's competitors who are resident and domestic corporations in Washington. Due process, we submit, works both ways. Certainly appellant is "doing business" in Washington, within the meaning of the Washington service statute, as utilized by the Washington unemployment compensation act as a means of obtaining jurisdiction over a foreign corporation which is not registered nor licensed to do business in Washington.

Appellant, having chosen to come into Washington by its selected, trained employees, to obtain the life-blood of its business—orders—enabling it to sell its merchandise and there enjoy the privilege of having its chosen representatives perform these services for it ("happy-go-lucky men," as appellant calls them, though they may be), may not now be heard to say that it was present in Washington only for purposes of benefit to it, but not present so as to be required to share with domestic competitors the expense of governmental functions designed to protect its own employees as well as theirs. Appellant may not so hide behind and so desert its own salesmen. A huge group of workers (employees of foreign corporations) should not be deprived of the benefits of legislation, endorsed and sponsored by the federal Congress, simply because they reside and labor within what appellant would ask to have established as a constitutional hiatus. Due process, we repeat, works both ways. The judgment of the state supreme court should be affirmed.

Respectfully submitted,

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## APPENDIX

Statutes of the State of Washington, and federal statutes, pertinent to this case; declaring purpose and policy; prescribing conditions of liability for unemployment compensation contributions, and providing for levy of the tax, process and appeal; all as relate to a foreign corporation present within the state through employed salesmen soliciting orders for the corporation's products. (*Italics are supplied.*)

### THE UNEMPLOYMENT COMPENSATION ACT OF THE STATE OF WASHINGTON

**Section 2:** Section 2, chapter 162, Session Laws of 1937, Rem. Rev. Stat. Supp., section 9998-102:

"Whereas, economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. Social security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance principle or sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of poor relief assistance. The State of Washington, therefore, exercising herein its police and sovereign power endeavors by this act to remedy the widespread unemployment situation which now exists and to set up safeguards to prevent its recurrence in years to come. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of

persons unemployed through no fault of their own, and that this act shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum."

**Section 7:** Section 7, chapter 162, p. 587, Session Laws of 1937, as amended by section 5, chapter 214, p. 830, Session Laws of 1939, Rem. Rev. Stat. Supp., section 9998-107:

"(a) **PAYMENT.**

"(1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 19 (g)) occurring during such calendar year, such contributions shall become due and be paid by each employer to the treasurer for the fund in accordance with such regulation as the commissioner may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in his employ;

"(2) In the payment of any contribution, a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent.

"(b) **RATE OF CONTRIBUTION.** Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

"(1) One and eight-tenths (1.8%) per centum with respect to employment during the calendar year 1937;

"(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years thereafter.

**Section 19 (e):** Section 19 (e), chapter 162, p. 609, Session Laws of 1937, as amended by section 16, chapter 214, p. 853, Session Laws of 1939, Rem. Rev. Stat. Supp., section 9998-119a (e):

"(e) 'Employing unit' means any individual or type of organization, including any partnership,

association, trust, estate, joint-stock company, insurance company or corporation, *whether domestic or foreign*, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act.

" \* \* \* \* \*

**Section 19 (f):** Section 19 (f), chapter 162, p. 609, Session Laws of 1937, Rem. Rev. Stat. Supp., section 9998-119 (f):

"(f) 'Employer' means:

"(1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week);

"(2) \* \* \* \* \*  
 "(3) \* \* \* \* \*  
 "(4) \* \* \* \* \*  
 "(5) \* \* \* \* \*  
 "(6) \* \* \* \* \*

**Section 19 (g)(1)(2)(3)(4) and (5):** Section 19 (g) (1) (2) (3) (4) and (5), chapter 162, pp. 610-612, Session Laws of 1937, as amended by section 16, chapter 214, pp. 856-857, Session Laws of 1939, Rem. Rev. Stat. Supp., sections 9998-119a (g) (1) (2) (3) (4) and (5):

"(g) (1) 'Employment,' subject to the other provisions in this sub-section, means *service, including service in interstate commerce*, performed for wages or under any contract of hire, written or oral, express or implied.

"(2) The term 'employment' shall include an individual's entire service performed within or both within and without this state if: (i) The service is localized in this state; or (ii) the service is not localized in any state but some of the service is performed in this state and (a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or (b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

"(3) Services not covered under paragraph (2) of this sub-section, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the Federal government, shall be deemed to be employment subject to this act if the individual performing such services is a resident of this state and the commissioner approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

"(4) Service shall be deemed to be localized within a state if:

"(i) The service is performed entirely within such state; or

"(ii) The service is performed both within and without such state, but the service performed without the state is incidental to the individual's service within such state, for example, is temporary or transitory in nature or consists of isolated transactions.

"(5) Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commissioner that:

"(i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

"(ii) Such service is either outside the usual course of the business for which such service is per-

formed, or that such service is performed outside of all the places of business of the enterprises for which such service is performed; and

"(iii) Such individual is customarily engaged in an independently established trade, occupation, profession or business, of the same nature as that involved in the contract of service."

**Section 19 (m):** Section 19 (m), chapter 162, p. 614, Session Laws of 1937, as amended by section 16, chapter 214, p. 860, Session Laws of 1939, Rem. Rev. Stat. Supp., section 9998-119a (m):

"(m) 'Wages' means the first three thousand dollars of remuneration payable by one employer to an individual worker for employment during any calendar year. 'Remuneration' means all compensation payable for personal services, including commissions and bonuses and the cash value of all compensation payable in any medium other than cash. The reasonable cash value of compensation payable in any medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the director; but until Congress shall amend title IX of the Federal Social Security Act approved August 14, 1935, to similarly limit the amount of taxable wages to three thousand dollars the term 'wages' for the purposes of this act shall be deemed to mean all remuneration payable by employers for employment."

**Section 14 (c):** Section 11, chapter 253, p. 906, Session Laws of 1941, Rem. Supp., 1941, section 9998-114c:

"Section 14 (c). At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except that if the employer cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last



known address by registered mail. If the amount so assessed is not paid within ten days after such service or mailing of said notice, the Commissioner or his duly authorized representative shall collect the amount stated in said assessment by the distraint, seizure and sale of the property, goods, chattels and effects of said delinquent employer. There shall be exempt from distraint and sale under this section such goods and property as are exempt from execution under the laws of this state."

**Section 6 (c)(d)(e) and (i):** Section 6 (c) (d) (e) and (i), chapter 162, pp. 583-586, Session Laws of 1937, as amended by section 4, chapter 214, pp. 825-829, Session Laws of 1939, as amended by section 4, chapter 253, pp. 881-884, Session Laws of 1941, Rem. Supp., 1941, section 9998-106c, d, e and i:

"Section 6 (c). **APPEALS.** When an appeal is taken, as provided in the foregoing section, unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the unemployment compensation division. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision on the claim, unless within ten days after the date of notification of mailing, whichever is the earlier, of such decision further appeal is initiated pursuant to section 6 (e).

"Section 6 (d). **APPEAL TRIBUNALS.** The Commissioner shall establish one or more impartial appeal tribunals each of which shall be presided over by a salaried Examiner who shall decide the issues submitted to the tribunal. No Examiner shall hear or decide any disputed claim in any case in which he is an interested party.

"Section 6 (e). **REVIEW.** The Commissioner may on his own motion, or upon the petition of any interested party, shall affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. The Commissioner

may transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal.

"Section 6 (i). COURT REVIEW. Within thirty days after final decision has been communicated to any interested party, such interested party may appeal to the Superior Court of the county of his residence, and such appeal shall be heard as a case in equity but upon such appeal only such issues of law may be raised as were properly included in his application before the appeal tribunal. The proceedings of every such appeal shall be informal and summary, but full opportunity to be heard upon the issues of law shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail or personally on the Commissioner, and the filing and service of said notice of appeal within thirty days shall be jurisdictional. The Commissioner shall within twenty days after receipt of such notice of appeal serve and file his notice of appearance upon appellant or his attorney of record, and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Superior or the Supreme Courts. When a notice of final decision has been placed in the United States mail properly addressed, it shall be considered *prima facie* evidence of communication to the appellant and his attorney, if of record.

"The Commissioner shall serve upon the appellant and file with the Clerk of the Court before trial a certified copy of his complete record of the claim which shall upon being so filed become the record in such case. No fee of any kind shall be charged the Commissioner for filing his appearance or for any other services performed by the Clerk of either the Superior or the Supreme Court.

"If the Court shall determine that the Commissioner has acted within his power and has correctly construed the law, the decision of the Commissioner shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Commissioner with an order directing him to proceed in accordance with the findings of the Court: *Provided*,

That any award shall be in accordance with the schedule of unemployment benefits set forth in this act.

"It shall be unlawful for any attorney engaged in any such appeal to the Courts as provided herein to charge or receive any fee therein in excess of a reasonable fee to be fixed by the Courts in the case, and if the decision of the Commissioner shall be reversed or modified, such fee and the fees of witnesses and the costs shall be payable out of the Unemployment Compensation Administration Fund. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court to the Supreme Court as in other civil cases. In all Court proceedings under or pursuant to this act the decision of the Commissioner shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

"Whenever any appeal is taken from any decision of the Commissioner to any Court, all expenses and costs incurred therein by said Commissioner including court reporter costs and attorney's fees and all costs taxed against such Commissioner shall be paid out of the Unemployment Compensation Administration Fund."

#### **State Process Statute for Civil Actions:**

Section 7, p. 408, Session Laws of 1893, Rem. Rev. Stat., section 226, subsection 9:

"The summons shall be served by delivering a copy thereof, as follows:

" \* \* \* \* \*

"(9) If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof;

" \* \* \* \* \*

**Federal Statute Precluding Immunity to Foreign Corporations:**

53 Stat. 187, as amended by 53 Stat. 1391, 26 U. S. C.,  
section 1606 (a):

"No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."

# SUPREME COURT OF THE UNITED STATES.

No. 107:—OCTOBER TERM, 1945.

International Shoe Company,

Appellant,

vs.

State of Washington; Office of Unemployment Compensation and Placement and E. B. Riley, Commissioner.

Appeal from the Supreme Court of the State of Washington.

[December 3, 1945.]

Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes, Washington Unemployment Compensation Act, Washington Revised Statutes, § 9998-103a through § 9998-123a, 1941 Supp., and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

The statutes in question set up a comprehensive scheme of unemployment compensation, the costs of which are defrayed by contributions required to be made by employers to a state unemployment compensation fund. The contributions are a specified percentage of the wages payable annually by each employer for his employees' services in the state. The assessment and collection of the contributions and the fund are administered by respondents. Section 14(c) of the Act [Wash. Rev. Stat., 1941 Supp., § 9998-114c] authorizes respondent Commissioner to issue an order and notice of assessment of delinquent contributions upon prescribed personal service of the notice upon the employer if found within the state, or, if not so found, by mailing the notice to the employer by registered mail at his last known address. That section also authorizes the Commissioner to collect the assessment by distraint if it is not paid within ten days after service of the notice. By §§ 14e and 6b the order of assessment may be administratively reviewed by an appeal tribunal within



the office of unemployment upon petition of the employer, and this determination is, by § 6i made subject to judicial review on questions of law by the state Superior Court; with further right of appeal in the state Supreme Court as in other civil cases.

In this case notice of assessment for the years in question was personally served upon a sales solicitor employed by appellant in the State of Washington, and a copy of the notice was mailed by registered mail to appellant at its address in St. Louis, Missouri. Appellant appeared specially before the office of unemployment and moved to set aside the order and notice of assessment on the ground that the service upon appellant's salesman was not proper service upon appellant; that appellant was not a corporation of the State of Washington and was not doing business within the state; that it had no agent within the state upon whom service could be made; and that appellant is not an employer, and does not furnish employment within the meaning of the statute.

The motion was heard on evidence and a stipulation of facts by the appeal tribunal which denied the motion and ruled that respondent Commissioner was entitled to recover the unpaid contributions. That action was affirmed by the Commissioner; both the Superior Court and the Supreme Court affirmed. 122 Wash. Dec. 135. Appellant in each of these courts assailed the statute as applied, as a violation of the due process clause of the Fourteenth Amendment, and as imposing a constitutionally prohibited burden on interstate commerce. The cause comes here on appeal under § 237(a) of the Judicial Code, 28 U. S. C. § 344(a), appellant assigning as error that the challenged statutes as applied infringe the due process clause of the Fourteenth Amendment and the commerce clause.

The facts as found by the appeal tribunal and accepted by the state Superior Court and Supreme Court, are not in dispute. Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940,

now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than \$31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant's office in St. Louis for acceptance or rejection, and when accepted the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All the merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.

The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there. *International Harvester v. Kentucky*, 234 U. S. 579, 587; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 87; *Frene v. Louisville Cement Co.*, 134 F. 2d 511, 516. The court found such additional activities in the salesmen's display of samples sometimes in permanent display rooms, and the salesmen's residence within the state, continued over a period of years, all resulting in a substantial volume of merchandise regularly shipped by appellant to purchasers within the state. The court also held that the statute as applied did not invade the constitutional power of Congress to regulate inter-

state commerce and did not impose a prohibited burden on such commerce.

Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1391, 26 U. S. C. § 1606 (a) provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334; *Perkins v. Pennsylvania*, 314 U. S. 586; *Standard Dredging Co. v. Murphy*, 319 U. S. 306, 308; *Hooven & Allison v. Evatt*, 324 U. S. 652, 679; *Southern Pacific Co. v. Arizona*, No. 56, 1944 Term, decided June 18, 1945, slip opinion p. 6.

Appellant also insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. It refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state. See *Green v. Chicago Burlington & Quincy Ry.*, 205 U. S. 530, 533; *International Harvester v. Kentucky*, *supra*, 586-587; *Phila. & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 268; *People's Tobacco Co. v. American Tobacco Co.*, *supra*, 87. And appellant further argues that since it was not present within the state, it is a denial of due process to subject it to taxation or other money exaction. It thus denies the power of the state to lay the tax or to subject appellant to a suit for its collection.

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyar v. Neff*, 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he

be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U. S. 457, 463. See Holmes, J., in *McDonald v. Mabee*, 243 U. S. 90, 91. Compare *Hoopeston Canning Co. v. Cullen*, 318 U. S. 314, 316, 319; See *Blockner v. United States*, 284 U. S. 421; *Hess v. Pawloski*, 274 U. S. 352; *Young v. Masci*, 289 U. S. 253.

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein v. Board of Supervisors*, 282 U. S. 19, 24, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Mr. Hand, J., in *Hutchinson v. Chase & Gilbert*, 45 F. 2d 139, 141. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson v. Chase & Gilbert*, *supra*, 141.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *St. Clair v. Cox*, 106 U. S. 350, 355; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 610-611; *Penna. Lumbermen's Ins. Co. v. Meyer*, 197 U. S. 407, 414-415; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 255-256; *International Harvester v. Kentucky*, *supra*; cf. *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to



suit on causes of action unconnected with the activities there. *St. Clair v. Cox*, *supra*, 359, 360; *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 21; *Frene v. Louisville Cement Co.*, *supra*, 515, and cases cited. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

While it has been held, in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, *Old Wayne Life Ass'n v. McDonough*, *supra*; *Green v. Chicago, Burlington & Quincy Ry.*, *supra*; *Simon v. Southern R. Co.*, 236 U. S. 115; *People's Tobacco Co. v. American Tobacco Co.*, *supra*; cf. *Davis v. Farmer's Cooperative Eq.*, 262 U. S. 312, 317, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See *Missouri, K. & T. Ry. v. Reynolds*, 255 U. S. 565; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259; cf. *St. Louis S. W. Ry. v. Alexander*, *supra*.

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U. S. 516, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. Cf. *Kane v. New York*, 242 U. S. 160; *Hess v. Pawloski*, *supra*; *Young v. Masci*, *supra*. True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. *Lafayette Insurance Co. v. French*, 18 How. 404, 407; *St. Clair v. Cox*, *supra*, 356; *Commercial Mutual Accident Co. v. Davis*, *supra*, 254; *Washington v. Superior Court*, 289 U. S. 361, 364-365. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. *Smolik v. P. and R. C. & I. Co.*, 222 Fed. 148, 151. Henderson, *The Position of Foreign Corporations in American Constitutional Law*, 14-95.



It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. *St. Louis S. W. Ry. v. Alexander, supra*, 228; *International Harvester v. Kentucky, supra*, 587. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer v. Neff, supra*; *Minnesota Ass'n v. Benn*, 261 U. S. 140.

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Compare *International Harvester v. Kentucky, supra*, with *Green v. Chicago, Burlington & Quincy Ry., supra*, and *People's Tobacco Co. v. American Tobacco Co., supra*. Compare *Mutual Life Ins. Co. v. Spratley, supra*, 619, 620 and *Commercial Mutual Accident Co. v. Davis, supra*, with *Old Wayne Life Ass'n v. McDonough, supra*. See 29 Columbia Law Review, 187-195.

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has

incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual. *Mutual Life Ins. Co. v. Spratley*, *supra*, 618, 619; *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 437-438; *Commercial Mutual Accident Co. v. Davis*, *supra*, 254-255. Cf. *Riverside Mills v. Menefee*, 237 U. S. 189, 194, 195; see *Knowles v. Guslight & Coke Co.*, 19 Wall. 58, 61; *McDonald v. Mabce*, *supra*; *Miltiken v. Meyer*, *supra*. Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit. Compare *Hess v. Pauloski*, *supra*, with *McDonald v. Mabce*, *supra*, 92, and *Wuchter v. Pizzuti*, 276 U. S. 13, 19, 24; cf. *Bequet v. MacCarthy*, 2 B. & Ad. 951; *Mau-bourquet v. Wyse*, 1 Ir. Rep. C. L. 471. See *Washington v. Superior Court*, *supra*, 365.

Only a word need be said of appellant's liability for the demanded contributions to the state unemployment fund. The Supreme Court of Washington, construing and applying the statute, has held that it imposes a tax on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages, here the commissions payable to the salesmen. This construction we accept for purposes of determining the constitutional validity of the statute. The right to employ labor has been deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution. *Steward Machine Co. v. Davis*, 301 U. S. 548, 579, *et seq.* And such a tax imposed upon the employer for unemployment benefits is within the constitutional power of the states. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 508, *et seq.*

Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's

salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax. *Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 146; cf. *International Harvester Co. v. Department of Taxation*, 322 U. S. 435, 442, *et seq.*; *Hoopston Canning Co. v. Cullen*, *supra*, 316-319; see *General Trading Co. v. Tax Comm'n*, 322 U. S. 335.

*Affirmed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK delivered the following opinion.

Congress, pursuant to its constitutional power to regulate commerce, has expressly provided that a State shall not be prohibited from levying the kind of unemployment compensation tax here challenged. 26 U. S. C. 1600. We have twice decided that this Congressional consent is an adequate answer to a claim that imposition of the tax violates the Commerce Clause. *Perkins v. Pennsylvania*, 314 U. S. 586 affirming 342 Pa. 529; *Standard Dredging Co. v. Murphy*, 319 U. S. 306, 308. Two determinations by this Court of an issue so palpably without merit are sufficient. Consequently that part of this appeal which again seeks to raise the question seems so patently frivolous as to make the case a fit candidate for dismissal. *Pay v. Crozer*, 217 U. S. 455. Nor is the further ground advanced on this appeal, that the State of Washington has denied appellant due process of law, any less devoid of substance. It is my view, therefore, that we should dismiss the appeal as unsubstantial,<sup>1</sup> *Seaboard Air Line Ry. Co. v. Watson*, 287 U. S. 86, 90, 92, and decline the invitation to formulate broad rules as to the meaning of due process, which here would amount

<sup>1</sup> This Court has on several occasions pointed out the undesirable consequences of a failure to dismiss frivolous appeals. *Salinger v. United States*, 272 U. S. 542, 544; *United Surety Co. v. American Fruit Product Co.*, 238 U. S. 140; *De Bearn v. Safe Deposit & Trust Co.*, 233 U. S. 24, 33-34.

to deciding a constitutional question "in advance of the necessity for its decision." *Alabama State Federation of Labor v. McAdory*, 323 U. S. 703; 89 L. Ed. 1270, 1277.

Certainly appellant can not in the light of our past decisions meritoriously claim that notice by registered mail and by personal service on its sales solicitors in Washington did not meet the requirements of procedural due process. And the due process clause is not brought in issue any more by appellant's further conceptualistic contention that Washington could not levy a tax or bring suit against the corporation because it did not honor that State with its mystical "presence." For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. To read this into the due process clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation. Nothing could be more irrational or more designed to defeat the function of our federal system of government. Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries; as we have held before. *Hoopston Canning Co. v. Cullen*, 318 U. S. 313. Were the Court to follow this principle, it would provide a workable standard for cases where, as here, no other questions are involved. The Court has not chosen to do so, but instead has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us. It has thus introduced uncertain elements confusing the simple pattern and tending to curtail the exercise of State powers to an extent not justified by the Constitution.

The criteria adopted insofar as they can be identified read as follows: Due Process does permit State courts to "enforce the obligations which appellant has incurred" if it be found "reasonable and just according to our traditional conception of fair play and substantial justice." And this in turn means that we will "permit" the State to act if upon "an estimate of the inconveniences" which would result to the corporation from a trial away from its 'home' or principal place of business", we conclude that

it is "reasonable" to subject it to suit in a State where it is doing business.

It is true that this Court did use the terms "fair play" and "substantial justice" in explaining the philosophy underlying the holding that it could not be "due process of law" to render a personal judgment against a defendant without notice to and an opportunity to be heard by him. *Mulliken v. Meyer*, 311 U. S. 457. In *McDonald v. Mabee*, 243 U. S. 90, 91, cited in the *Milliken* case, Mr. Justice Holmes speaking for the Court warned against judicial curtailment of this opportunity to be heard and referred to such a curtailment as a denial of "fair play", which even the common law would have deemed "contrary to natural justice." And previous cases had indicated that the ancient rule against judgments without notice had stemmed from "natural justice" concepts. These cases, while giving additional reasons why notice under particular circumstances is inadequate, did not mean thereby that all legislative enactments which this Court might deem to be contrary to natural justice ought to be held invalid under the due process clause. None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notions of "natural justice." I should have thought the Tenth Amendment settled that.

I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts", a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court's notion of "fair-play", however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more "convenient" for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words "fair play", "justice", and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government,



ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards. Express prohibitions against certain types of legislation are found in the Constitution, and under the long settled practice, courts invalidate laws found to conflict with them. This requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose. But that is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect, persons and businesses within the State, provided proper service can be had. Superimposing the natural justice concept on the Constitution's specific prohibitions could operate as a drastic abridgment of democratic safeguards they embody, such as freedom of speech, press and religion,<sup>2</sup> and the right to counsel. This has already happened. *Betts v. Brady*, 316 U. S. 455. Compare *Feldman v. United States*, 322 U. S. 487, 494-503. For application of this natural law concept, whether under the terms "reasonableness", "justice", or "fair play", makes judges the supreme arbiters of the country's laws and practices. *Polk v. Glover*, 303 U. S. 5, 17-18; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 600, n. 4. This result, I believe, alters the form of government our Constitution provides. I cannot agree.

True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice. I therefore find myself moved by the same fears that caused Mr. Justice Holmes to say in 1930:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." *Baldwin v. Missouri*, 281 U. S. 586, 595.

<sup>2</sup> These First Amendment liberties—freedom of speech, press and religion—provide a graphic illustration of the potential restrictive capacity of a rule under which they are protected at a particular time only because the Court, as then constituted believes them to be a requirement of fundamental justice. Consequently, under the same rule, another Court, with a different belief as to fundamental justice, could at least as against State action, completely or partially withdraw Constitutional protection from these basic freedoms, just as though the First Amendment had never been written.

